United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

76-7292

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

GEORGE ARTHUR, *et al.*,

Plaintiffs-Appellees,

v.

EWALD P. NYQUIST, *et al.*,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NEW YORK

BRIEF FOR PLAINTIFFS-APPELLEES,

George Arthur, Norman Goldfarb, William and Wilhelmina P. Seales, John Medige, and The Citizens Council for Human Relations, Inc. and National Association for the Advancement of Colored People, Buffalo Branch

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Issues Presented for Review

In this school desegregation case involving the Buffalo Public School System (BPSS) in which the Court found the City appellants and State appellants liable, the City appellants (City brief), State appellants (State brief) and eight State

Regents appellants (separate Regents' brief) raise the following issues:

1. Does the record contain sufficient evidence to sustain the District Court's finding of segregative acts on the part of the City defendants? (City brief only)

2. Does the record contain sufficient evidence to sustain the District Court's finding of segregative acts on the part of the State defendants? (State brief and separate Regents' brief)

3. Did the District Court apply the proper standards in determining segregative intent? (All briefs)

4. Does the Court have subject matter jurisdiction? (City and State briefs)

5. Did the Court properly exercise its descretion in permitting appellees to add the new School Superintendent and individual Buffalo Board members and Regents as defendants in their official capacities? (All briefs)

6. Did the District Court have the power to direct the State defendants to devise a plan to involve suburban schools in a remedy? (Separate Regents' brief only)

Statement of Case

Nature of Case

This is a school desegregation case in which the parents and Citizens Council for Human Relations and National Association for the Advancement of Colored People, Buffalo Branch, seeks redress against local and state authorities for creating and maintaining and perpetuating segregated schools in Buffalo, New York in violation of the Fourteenth Amendment to the Constitution of the United States.

The District Court, Hon. John T. Curtin, Western District of New York, in a Decision and Order of April 30, 1976 found that "the Board of Education, the Superintendent of Schools, the Common Council, the Commissioner of Education and the Board of Regents have violated the plaintiffs' Fourteenth Amendment right to equal protection under the laws by intentionally causing and maintaining a segregated school system" *(Arthur v. Nyquist,* 415 F. Supp. 904 (W.D.N.Y. 1976) (A-1030).

History of Proceedings to Date

The complaint was filed on June 26, 1972. The defendants moved to dismiss upon various grounds (A-47 *et seq.*), but no order was entered denying those motions. The State defendants (Commissioner Nyquist and Board of Regents) filed their answer on April 2, 1973 (A-4). On April 30, 1974, upon appellees' motion, an order was entered adding as defendants the Mayor of the City of Buffalo and members of the Common Council (A-72). The answer of the City defendants was filed July 16, 1974 (A-5).

On October 1, 1974 a detailed stipulation of facts (A-80) was filed in advance of the trial which was held before the Hon. John T. Curtin in October 1974 (A-136). Following the filing of briefs and requests to find, oral argument was conducted on September 18 and 19, 1975 (A-7). On April 8, 1976 the appellees moved to amend the complaint to name as defendants the new Superintendent of Schools, Eugene T. Reville, and the members of the Buffalo Board of Education and Board of Regents (A-7; A-1004).

On April 30, 1976 the motion to amend was granted (A-1019) and a separate order was entered (A-1013) granting this relief. On April 30, 1976 Judge Curtin handed down his de-

tailed Decision and Order finding that the Board of Education, Superintendent of Schools, the Commissioner of Education and the Board of Regents had violated appellees' Fourteenth Amendment right to equal protection under the laws by intentionally causing and maintaining a segregated school system (A-1030; A-1190) and directed the appellants to present plans to desegregate the BPSS. *Arthur v. Nyquist,* 415 F. Supp. 904 (W.D.N.Y. 1976).

On May 26, 1976 eight of the fifteen Regents retained separate counsel (A-7) who filed a notice of appeal on June 1, 1976 (A-8).

Judge Curtin issued clarifying Decisions and Orders subsequent to his principal Decision and Order of April 30, 1976. The June 3, 1976 Decision and Order made various corrections including the addition at various places in his findings of the words "Common Council" (A-1228), and a June 10, 1976 Decision and Order explained that the individual members of the Board of Regents and the Board of Education were added in their official capacities only (A-1226).

The separate Regents filed a motion on June 16, 1976 to reconsider and modify the Court's Decision of April 30, 1976 (A-122), and the Attorney General joined in the motion on behalf of the remaining Regents and Commissioner (A-1295). All motions were denied in a Decision and Order of December 10, 1976 (A-1287).

The Regents and Commissioner filed a Notice of Appeal on June 14, 1977 (A-8). The City defendants' Notice of Appeal was filed August 6, 1976 (A-10). The appellees moved in this Court to dismiss the City's appeal as being untimely, but the motion was denied on November 8, 1976. *Arthur v. Nyquist,* 547 F.2d 7 (2d Cir. 1976).

The first set of remedy hearings was conducted in June 1976 following the submittal of proposed plans by the City and State appellants (A-9). The Court delivered its first remedy Decision and Order on July 9, 1976 (A-1286a).

On December 14, 1976 Judge Curtin, *sua sponte,* directed all parties to analyze and brief the Supreme Court decision in *Austin Independent School District v. United States,* 97 S.Ct. 517 (1976), and *Washington v. Davis,* 426 U.S. 229 (1976), as these pertain to the present case. On December 30, 1976 the City defendants filed a motion to "vacate," or, in the alternative, to "reconsider" the Court's principal Decision and Order of April 30, 1976 (A-1299) under *Washington v. Davis.* On March 1, 1977 Judge Curtin filed a Decision and Order reconsidering, and, upon reconsideration, reaffirmed the Decision and Order of April 30, 1976 (A-1326).

The Docket Entries (A-3-16) describe a number of other proceedings below. These are not set out because they relate either to remedy aspects or other matters not briefed by any of the appellants.

Facts

Buffalo is a city of approximately 450,000 persons as of October 1974 when this case was tried (A-1049). In 1973-74 there were 61,060 children in the BPSS (A-1340). Of the 61,060 children, 32,527, or 53.3% , were majority and 28,433, or 46.7% , were minority black or other (A-1340).

The BPSS consisted of 77 elementary schools, four middle and two junior high schools, and seven academic high schools and six vocational-technical high schools (Exh. 6; A-1333).

With few exceptions, there were separate schools for whites and separate schools for blacks.

For the 1973-74 school year, of the 77 elementary schools, 21 were 86-100% black and 31, 86-100% white; of the six middle and junior high schools, four were 90% or more black, and of the two others, one was over 88% white and one over 72% white; of the seven academic high schools, one was 98.5% black and two were over 80% white.

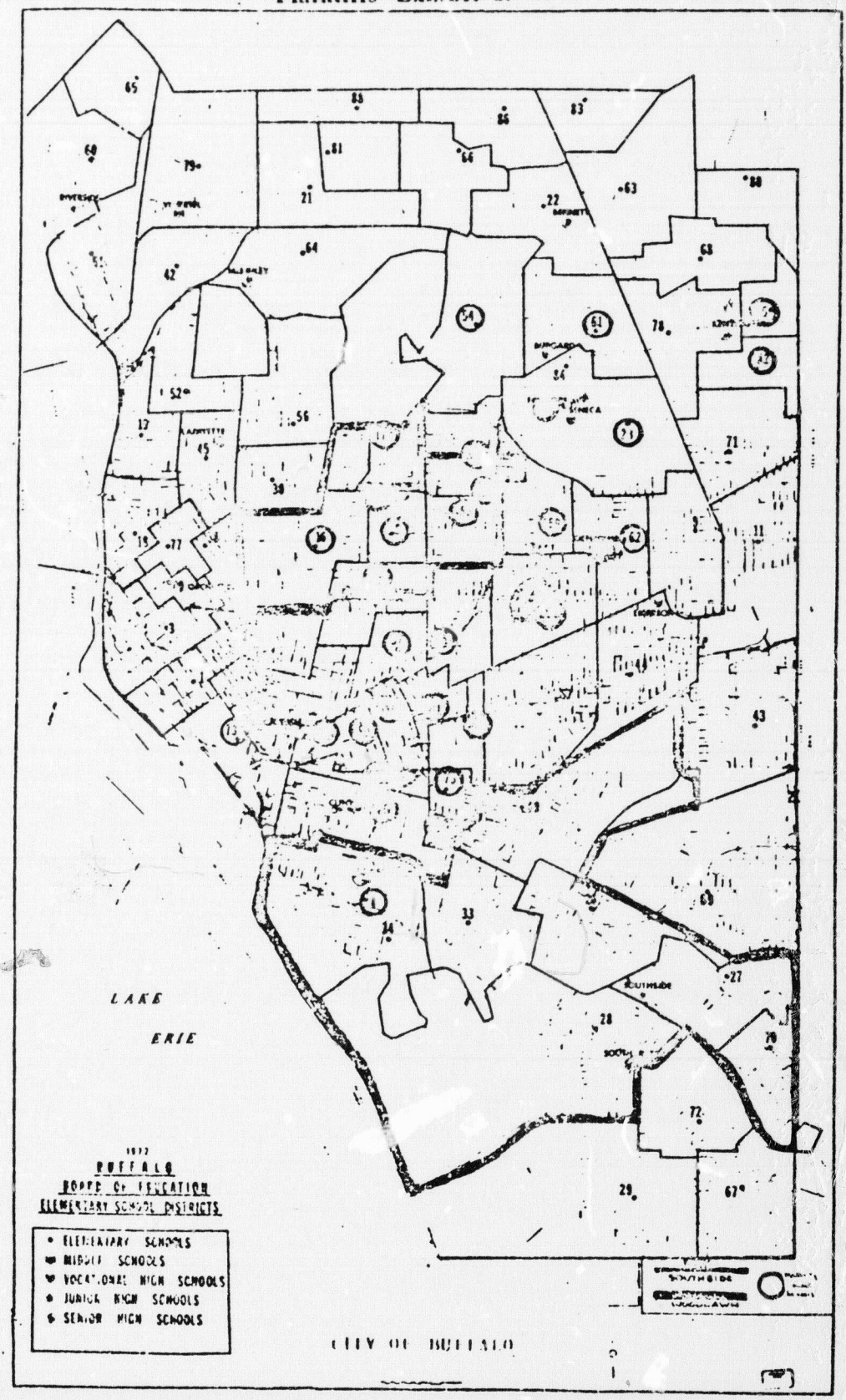
The concentration of black elementary schools is illustrated by those circled in black on Exhibit 1, a map showing the elementary school districts which is the next page of this brief.

On February 15, 1965 those seeking to eliminate segregated schools in Buffalo obtained an order from the Commissioner of Education, James E. Allen, directing the City appellants to submit a plan for the progressive elimination of racial imbalance in Buffalo (*The Matter of Yerby Dixon;* A-110). For the next few years, while polite exchanges occurred between the City and State appellants, segregation increased.

Appellees wrote to appellant Commissioner Nyquist on December 13, 1971:

> It is seven years since the Yerby Dixon petition, citing a violation of Section 310 of the State Education law, was filed with your department. The recitation below of the sequence of events reveals that your office has permitted the Buffalo Board of Education to make token gestures toward desegregating the BPSS by a series of piecemeal efforts and unkept promises. The Board's policies have resulted in increasing the number of racially black students. Your timidity in dealing with the Board has encouraged these reluctant men to cling to a bankrupt desegregation program and to continue an educational system that, in many ways, is not relevant for over 30,000 black children. At the same time, thousands of white children have been warped by their parents' stereotypes by the time they come in contact with black children, if

Plaintiffs' Exhibit 1.



> they ever do. The situation has not been an accident and its perpetuation, permitted by you, is no accident. [Appellees' Exh. 102; A-1436]

Responding to this letter, the appellant Nyquist wrote to the President of the Buffalo Board, Mr. Arnold B. Gardner, on January 20, 1972 stating in part:

> Faced with the hard fact that segregation is more severe in Buffalo now than it was seven years ago, with over twenty schools more than 90% black, and twenty-nine schools 90% or more white, it is clear to me that only a new approach can equalize educational opportunity for the children of Buffalo. [Appellees' Exh. 103; A-1445]

The Buffalo Board was not responsive (A-1461) and this was made clear to appellant Nyquist in a meeting with the Buffalo Board on February 21, 1972 following which he held a press conference:

> Press: Commissioner what are the alternatives if the Board is unable to agree on a plan?
>
> Comm. Nyquist: . . . There are two remedies in the law, and you can read the law as well as I can, when a Board—see a school district or school board is an extension of the State. Education is a state function and when a Board refuses to carry out educational policies the Board of Regents or the Commissioner of Education, the two remedies that are specifically stated are the withholding of state aid and the initiation of proceedings to remove the Board. And I hope we don't have to come to that. [Exh. 105; A-1452].

A plan for desegregation came before the Buffalo Board but it was "received and filed" (A-1483) in March 1972 which is tantamount to its rejection (A-269). The directive of the appellant Commissioner was defied (A-776). The Regents were aware that their policy directive for integration was officially

frustrated in Buffalo, yet the polite correspondence continued. As of October 1973 the Commissioner is still writing: "I was as disappointed as you in our inability to get the Board to consider a reasonable approach to integrating the schools" (Nyquist to Gardner, Exh. 266; A-1675). At the same time Board President Gardner met with Deputy Commissioner Thomas Sheldon and Regent Willard A. Genrich. Gardner told Sheldon, "I spoke to him rather sharply that the commissioner had let far too much time pass, that although I have high personal regard for Dr. Nyquist, I felt the whole situation had degenerated because of the passage of time, and that the State Commission [sic] was operating really as the boy who threw the brick and ran" (A-285).

Earlier, on May 29, 1972, after the Buffalo Board had rejected in its entirety the Commissioner's directive of January 20, 1972 (A-1487), Mr. Gardner wrote to appellant Commissioner stating "what is thought to be *de facto* segregation may well be *de jure* segregation" (A-1491). The Gardner letter points to these acts of segregation by the Buffalo Board:

1. Districting of Woodlawn Junior High School to make the school all black.

2. The device of allowing white students to take the Polish language at South Park High School to avoid attending a predominantly black school.

3. School 16 all black in an all white neighborhood.

4. Using optional districts to permit whites from going to school with blacks.

5. Discriminatory admission policies in vocational schools.

6. Failure to provide money for middle schools and to lease a school in South Buffalo because of its anticipated racial composition (A-1491; A-1492).

The appellants Commissioner or Regents have not exercised their powers to effect desegregation in Buffalo. The Commissioner has taken no steps since February 15, 1965 to remove any member of the Buffalo Board or any of its employees or to withhold funds, nor has he taken any steps to seek a court order compelling compliance with his order of February 15, 1965 (Stip. ¶ 138; A-122). And, both before and during this period the Commissioner and Regents approved the siting and construction of schools, including Woodlawn and No. 39, which they knew would create, maintain and perpetuate racial isolation and segregation (Stip. ¶ 141; A-122).

It was not until after the Commissioner was required to testify by plaintiffs upon the trial in October 1974 (A-742), that he issued a show cause order in January 1975 to the Buffalo Board. But to this date no order from the Commissioner or Regents has been finalized against Buffalo. The admissions in the Commissioner's show cause order are significant:

> A review of other events over the past nine years makes it clear that the respondent has not only neglected to develop and implement an effective plan for racial integration of its schools, but by certain of its acts, procedures and policies has increased segregation within its schools.
>
> The respondent has changed the grade levels served by certain schools, and in so doing has transferred minority students from predominantly white schools to predominantly minority schools.
>
> The respondent has operated a school attended by predominantly black children in an area which is surrounded by predominantly white schools. In so doing the board has established and maintained school attendance areas which have resulted in segregation.
>
> The respondent has maintained certain grade structures for predominately white schools and other grade

structures for predominately minority schools. According to 1974-75 data, of the twenty-eight schools serving grades K-8, twenty are predominately white. The district's K-4 schools are all predominately white; and its K-7 schools are predominately white. While its K-5 and K-6 schools range from 6.7% minority enrollment to all minority students, most are substantially segregated. Only two of the thirty-four K-5 and K-6 schools have minority enrollments which are within 10% of the district average.

Differences in grade structure account for most white students entering high school at the ninth grade level, and most minority students entering at the tenth grade level, thus creating racially isolated schools for the ninth year.

The respondent has maintained 'optional transfer zones' which have resulted in an intensification of segregation. Data indicate that white students living within such zones have been transferred from schools with increasing minority enrollments to predominately white schools, with no comparable transfers from those areas on the part of black students.

The respondent has established attendance zones for newly constructed schools which have resulted in those schools being substantially segregated, although attendance zones could have been established in such a way that the student bodies would have been integrated.

The respondent has made decisions and established policies which have resulted in substantially segregated programs in special education for mentally retarded pupils. The board has arranged to transport many special education children to essentially segregated schools.

The board has operated an essentially all-black vocational school for girls.

The board has operated a school for pregnant girls which has an all-black student body.

The respondent has permitted white students to transfer out of a high school with an increasing minority population to other predominantely white high schools under a transfer policy based on course selection and offerings. In past years the board approved the offering of certain foreign languages in predominantly white high schools but did not offer comparable courses in a predominantly black high school, thus encouraging increased racial isolation. This transfer policy was substantially responsible for a high school becoming in 1974-75, 99% black in student population.

The respondent has not employed minority professional staff members in numbers which are comparable to the school enrollments of the general population of the city. During the past eight years the percentage of minority staff members has actually declined. A pattern has been developed of assigning minority teachers to schools with high minority populations, thus intensifying the racial isolation of students in the school system.

The respondent, in official board action in 1965, instructed its superintendent to develop an integration plan, but specified that it must not involve the transportation of white children into non-white areas. Such action illustrates the dual standards which have prevailed in board policies concerning the education of white and minority-group children, and which have resulted in a segregated school system.

It is clearly evident from these facts that the respondent is maintaining a segregated school system, a condition which is contrary to law and to state policy.

It is also evident that the Buffalo board of education has taken actions which have had both the purpose and the effect of maintaining a substantially segregated school system, and that there is a direct relationship between the acts of the board of education and the current condition of segregation. In taking such actions, and

> in continuing to operate a segregated school system, the Buffalo board of education has violated the Fourteenth Amendment to the Constitution of the United States and has denied equality of educational opportunity to many of its children by reason of their race [Exh. 306; A-1743; A-1747].

Appellees also presented evidence of City and State discrimination relative to housing which contained minority persons in certain parts of the City thereby contributing to segregation in the schools. This proof focused upon various aspects of housing discrimination including:

1. Relocation by the City of virtually all black persons displaced by the Ellicott Redevelopment Project to two areas in the central city (A-1661).

2. The City's Municipal Housing Authority placing blacks in black public housing projects and whites in white projects (R. Vol. V, pp. 125-128).

The City's failure to enact an open housing ordinance to eliminate discrimination in owner occupied two-family houses—constituting the bulk of rental housing available to blacks—after the City represented in its model cities application that it would enact such an ordinance (A-827; A-836).

4. Discrimination in housing by developers and real estate boards (A-720 *et seq.*).

5. The effect of F.H.A. and V.A. discriminatory practices upon mortgage lending (See, *e.g.*, Exh. 228; A-1634).

It is respectfully suggested that the Trial Court's Decision and Order of April 30, 1976 is a model of painstaking findings of intentionally segregative acts which sustain liability on the part of appellants.

ARGUMENT.

Background of Authorities in School Desegregation Cases.

The history of pertinent authorities upholding the right to eliminate a denial of equal protection resulting from segregative acts of northern urban school systems is well explained in this Court's decision in *Hart v. Community School Bd. of Ed., N.Y. Sch. Dist. No. 21*, 512 F.2d 37 (2d Cir. 1975), and the District Court's decision in 383 F.Supp. 699 (E.D. 1974).

A system of separating persons by race in public schools is inherently unequal. Segregation of children in public schools on the basis of race deprives minority group chlidren of equal educational opportunities even though the physical facilities and other "tangible" factors may be equal. *Brown v. Board of Education*, 347 U.S. 483, 493 (1954). "It is not the history of segregative practice alone which requires affirmative action to void discrimination. It is the fact of the discrimination itself, if it results from state action, that violates the equal protection clause. And it is settled that local school boards are agents of the State for Fourteenth Amendment purposes." *Hart, supra*, 512 F.2d at 51.

Brown dealt with statutory discrimination. "But it is too obvious and well settled to merit extended discussion, that racial discrimination which is accomplished by administrative design is no less repugnant to the equal protection clause than discrimination which has a statutory imprimatur." *Hart, supra*, 383 F.Supp. at 726. In cases involving dual school systems in both rural and urban communities, the Supreme Court has held that such systems must be eliminated "root and branch" and that school boards must come forward with

"a plan that promises realistically to work and promises realistically to work *now.*" *Green v. County School Board of New Kent Co., Va.*, 391 U.S. 430 (1968). *Swann v. Charlotte-Mecklenberg Board of Education*, 402 U.S. 1 (1971).

In 1973 the Supreme Court decided *Keyes v. School District No. 1, Denver, Colorado*, 413 U.S. 2686 (1973). Denver's system had not been operated under a state imposed requirement of racial segregation; but the complaint was that its School Board alone, by use of various techniques such as the manipulation of student attendance zones, school site selection and a neighborhood school policy, created or maintained racially segregated schools entitling petitioners to a decree directing desegregation. The Court held that state-imposed segregation in a substantial portion of the district supports a finding by a trial court of the existence of a dual system. *Keyes* has been the touchstone authority for northern school cases.

In 1976 the Supreme Court decided *Washington v. Davis*, 426 U.S. 229 (1976), involving the validity of a police qualifying examination in the District of Columbia, and held that the disproportionate impact of a test neutral on its face was not of itself evidence of purposeful discriminatory intent. The Court commented upon school desegregation cases noting that the mere fact that there are both predominantly black and predominantly white schools in a community is not alone a violation of the Equal Protection Clause, but, under *Keyes*, such segregated schools must be the result of intentional state action, purpose or intent to segregate. 96 S.Ct. 2048. Later in 1976 the Court in *Austin Independent School District v. United States*, 97 S.Ct. 517 (1976), remanded the Austin, Texas case to the Fifth Circuit for reconsideration. *Austin*, however, merely reversed and remanded directing

that the decision be reviewed in light of *Washington v. Davis, supra,* where the Fifth Circuit rested its finding of racially discriminatory intent solely upon the assignment of students to neighborhood schools. (There were other findings that the trial court in *Austin* may have been able to make to justify segregative intent. See footnote "1" to Justice Powell's concurring opinion in *Austin.*)

Then, in early 1977, the Court explained further its standards for determining discriminatory intent in *Village of Arlington Heights v. Metropolitan Housing Development Corporation,* 97 S.Ct. 555 (1977), pointing to *Keyes* as the principal school desegregation authority.

Most recently the Supreme Court remanded cases involving the school systems in *Dayton, Omaha* and *Milwaukee.* In *Dayton Board of Education of Brinkman,* 45 U.S.L.W. 4910 (June 28, 1977), the Court remanded with direction to make new findings in light of *Washington v. Davis* and *Arlington.* The Court also set out further clarifying standards relative to scope of remedy, but the remedy aspect is not now before this Court. The remands in *School District of Omaha v. U. S.,* 45 U.S.L.W. 3850 (June 28, 1977), and *Brennan v. Armstrong,* 45 U.S.L.W. 3850 (June 28, 1977) (Milwaukee), relate mainly to scope of remedy.

POINT I

The City defendants employed a wide variety of intentionally segregative devices to create, perpetuate and maintain the segregated schools in the BPSS.

The evidence of segregative acts on the part of the City defendants is extremely strong. One need only read the recital of the conduct of the Buffalo Board in the appellant Com-

missioner's show cause order of January 1975 set out in the "Facts" section of the brief (Exh. 306; A-1743-1747).

Buffalo not only employed traditionally used segregative devices—districting, optional attendance zones, school siting, faculty assignments, grade structure and feeder patterns—but the BPSS also used some unique transfer devices and tests for vocational schools.

In addition, the history and circumstances of the open defiance, in March 1972, of State directives to desegregate, marshalled in POINT II discussing the State appellants' liability, is in and of itself a principal ground to support a finding of intent to segregate.

Before analyzing various segregative acts, it should be noted that in the face of extensive evidence of conduct causing segregation, which the Court found to be widespread and affected a substantial portion of the students, schools, teachers and facilities within the school system (A-1326), the defendants offered practically no evidence to contradict appellees' proof. The Court singled out the appellant Superintendent Manch and Board Member Parlato for special mention upon the districting of Woodlawn Junior High School:

> Also, the defendants' failure to call Superintendent Manch, Mr. Parlato or any other of the principal figures to the districting decision, supports the inference that this testimony would not alter the conclusion the evidence leads the Court to make [A-1094].

Evidence of widespread acts of segregation spread throughout the BPSS, unrebutted by the appellants, falls far short of the duty imposed upon school defendants to show that other segregated schools are not the consequence of appellants' segregative acts as well. *Keyes v. School District No. 1*, 413 U.S. 189 (1973) at 208.

In this part of the brief appellees focus upon some of the more significant segregative acts included in the Trial Court's findings.

Transfers

The defendants have freely granted transfers to white students to escape attending schools with black children, thereby contributing to the segregation of elementary and high schools.

Judge Curtin found that East High School, a four-year academic high school with close to 2,000 students, became an all-black segregated school because of segregative acts (A-1080; A-1319). The principal techniques used at East were special foreign language policies to permit white students to avoid attending the school, and redistricting for purposes of minority attendance (A-1064).

Judge Curtin found that improper transfers of students at the elementary, junior high and high school level which occurred throughout the system were a substantial contributing cause to segregation. Because of the different feeder patterns and grade structures, these transfers had potentially double and triple segregative ramifications (A-1097). The Court noted that "What is attacked is the knowing granting of transfers, for specious or blatantly discriminatory reasons, that increases the segregation that characterizes many schools in Buffalo" (A-1103).

The language transfer device, particularly as it affected East High School, was one of the most flagrant of Buffalo's practices. Two standard policies of the Buffalo Board were violated to accomplish this result. The first is that a student must attend the academic high school serving the district in which he or she resides. The only exceptions are for hardship,

language and voluntary integration (Stip. ¶ 42; A-97). The other policy is that a foreign language will be offered at an academic high school if there is sufficient interest in the subject (Stip. ¶ 46; A-99). The criterion for determining sufficient interest is that at least fifteen students desire to take a particular language (A-596).

As blacks would move into white areas, previously all-white schools started to have an increasing percentage of black students. This is natural integration. However, in Buffalo this process was frustrated by the Board by freely granting transfers to white students to attend schools outside the districts of their residence, thereby decreasing the white percentage and increasing the black percentage in the affected schools. The evidence established that the transfers were granted contrary to the policies of the Board, with knowledge not only of a purpose to avoid attending schools with blacks but also the effect of such transfers in causing segregation. In many instances the Board applied different standards to white transfer applications than those of blacks, and initiated the removal of language programs to permit wholesale escape of white individuals.

Two major steps were taken relative to East High School:

(1) The Board determined not to offer certain languages at East High School.

(2) The Board granted so-called language transfers permitting white students to avoid attending East High School. A large number of white students have lived in the East district. Many were interested in the Polish language; many in Italian; many in Russian. As of October 22, 1971, when the HEW investigation of Buffalo was conducted, there were 170 white students from the East district permitted to go to South Park

to take Polish and 24 to take Russian (Stip. ¶ 56; A-101). There were 30 to 35 students as of April 12, 1972 from the East district taking foreign languages at Kensington (Stip. ¶ 57; A-101). The Director of Pupil Placement Services explained the Board's language policy which was violated in the case of East.

> Q. You told us, and it is in the Stipulation, that whenever at least fifteen students in a high school district want a language it is the policy of the Board to offer it right at the school where they reside, correct?
>
> A. Yes.
>
> Q. You are not anxious to have this wholesale transferring around the City, right?
>
> A. No, never anxious to have that.
>
> Q. The policy always is, is that if you have an interest in a language at a particular school, you want to offer the subject, right?
>
> A. That has been the policy.
>
> Q. Not only do we have an absence of Polish at East, and an absence of Russian at East, and an absence of Hebrew, we now find that we have an absence of Italian at East, so that students regardless of whether they are white or black at East who want to take Italian, have to leave the district. Was that true from the 60s to '72?
>
> A. As far as I can recall, yes [A-676, 7].

Why was Polish discontinued at East in 1960 when the demand was so strong? Why was Russian not offered? Why were the students permitted to go to South Park High School which was overcrowded? Why was there no follow-up to even know whether the student enrolled in the Polish language at South Park? The answer is that this was the escape valve devised by the Board. The situation was so bad that when school started Mr. Girard described the condition in his office and hallways in City Hall as similar to a supermarket where tickets are issued. Year after year this was brought to

the attention of defendant Manch who did nothing to cause language courses so strongly sought after to be taught at East (A-601).

There was little doubt about the language device. Once a student was granted a transfer for a language there was no follow-up to see if he continued in the course or if he even registered for the subject upon arrival in the school outside of his district (Record, Vol. IV, pp. 48 *et seq.*). And Mr. Girard knew the real reason for these requests:

> Q. All right. Now, let me, in all fairness, ask you this question. If you were asked, like I'm asking you, what did you think in many instances was the reason, the real, true reason behind what was ostensibly on the record for that transfer in many instances, what would your answer be?
>
> A. Well, if you are referring to when they gave a valid reason, they come in and ask for a language that wasn't offered at East High School, that they might have had a purpose to evade East High School, is that what you are referring to?
>
> Q. Right.
>
> A. This might have been their intent, to ask for a language that was not offered at East High School, yes.
>
> Q. Did I understand you to say that when many of the persons came in for transfers that you knew they were using some reason for the transfer, they gave something on paper but you knew the real reason was that they didn't want to go to school with blacks?
>
> A. I said they gave a valid reason, they came—most of them asked for Polish, they might have had other intentions or reasons behind it, the evasion of East High School.
>
> The Court: The question is, Mr. Girard, did you suspect that?
>
> The Witness: Did I suspect that? In many cases I did, yes, your Honor (R. Vol. VIII, pp. 100 *et seq.*).

The State of New York and City of Buffalo Subsidized these Transfers.—To rub salt into the wounds, the evidence shows that transportation by bus was paid for to enable the white students to leave the East district to take a language at South Park. At page 203, line 5 and following, Mr. Girard testified that a student is entitled to a bus pass if he resides more than one and one-half miles from the school which he attends. South Park is more than one and one-half miles from the East district (A-603). He was further asked:

> Q. All right. Therefore, any person who would attend South Park High School from the East High School District would be subsidized and bused to South Park High School, is that correct?
>
> A. Well, what do you mean, Mr. Griffin, in regard to subsidizing, he was given a bus pass?
>
> Q. Bus pass so that the bus transportation would be paid for by the City of Buffalo and the State of New York, is that correct?
>
> A. Not in all cases. There are other means of transportation like some of the students may drive their car, you see, and so we wouldn't be responsible for these type of students.
>
> Q. But they would be entitled as a matter of right?
>
> A. They would be entitled if it is at least a mile and a half, yes.
>
> Q. To a bus pass?
>
> A. Yes.
>
> Q. And therefore, it is true, is it not, that the City of Buffalo has been providing bus transportation for the students of the East High School district to attend South Park High School under these language transfers, is that correct?
>
> A. That's correct.
>
> Q. And so that if students have used this as a,—students and parents,—as a means of not going to a school with a number of blacks the City has in effect sub-

sidized and provided, —strike 'subsidized', —provided transportation to escape an integrated experience, is that true?

Mr. Gregory: I am going to object to the form of the question.

The Court: I will sustain.

Mr. Griffin: I will withdraw the question. Perhaps it is better [A-603 *et seq.*].

Sections 60 to 64 of the Stipulation (A-101) relate to the impact of the other transfers to flee white schools that were granted throughout the system on a regular basis. There were from 2,000 to 4,000 white students annually attending schools outside of their districts. This contributed to the higher percentage of black students in various schools including Schools 54, 16, Fillmore Middle, Genesee-Humboldt, Woodlawn, and East High School. Relating the annual transfers of 2,000 to 4,000 white students to the total white population of 30,127 students means that on an average, eight to twelve percent of the white population was permitted to transfer each year. The cumulative result over four or five years has a significant impact on the ability of any school to become or remain integrated.

The statistics in the 60's relative to the middle schools are dramatic. In early 1960 the Board opened Fillmore Middle School and claimed it would be integrated (Exh. 10). In October 1966 the white percentage was 57.3%, but in 1973 it had dropped to 11% (A-1355). A similar claim was made for Genesee-Humboldt Junior High School (Exh. 10). In 1966 its white percentage was 68.3%, but in 1973 it had dropped to 9.1% (A-1355). Mr. Gilbert H. Francis, who headed the HEW review team which conducted a compliance investigation into Buffalo, made findings of violations by means of transfers

(A-532 *et seq.*; A-1669). These findings were corroborated by Commissioner Nyquist (A-1745). The impact of the transfers is significant. The effect of granting permission of a white to leave a particular school that blacks were attending in large numbers not only affected the two schools directly involved, namely, the school in the district of residence which the student doesn't attend, and the white school outside his district which he does attend. It extends to other schools, especially middle and junior high schools which are fed by elementary schools. This is covered in part by paragraphs 63 and 64 of the Stipulation and by the testimony of Mr. Girard:

> Q. Now, Mr. Girard, if a student goes to School 16, he then, after 6th or 7th Grade would go to Woodlawn Junior High School, is that correct?
>
> A. Yes, School 16 is a feeder school for Woodlawn Junior High School.
>
> Q If he is granted a transfer and goes to, say, School 30, he would not go to Woodlawn, would he?
>
> A. No.
>
> Q. He would go to Lafayette or Grover for high school, is that correct?
>
> A. No, School 30 only goes to the 6th Grade, it's a feeder school into School 56.
>
> Q. He would then go to School 56—
>
> A. Which goes into Lafayette High School.
>
> Q. —for two years, and then into Lafayette High School?
>
> A. Yes, sir.
>
> Q. Now, by granting a transfer of a white student out of the School 16 District, it meant that that white student would not go to School 16, it would not go to Woodlawn, is that correct?
>
> A. That is correct. The transfer is granted, and that student, if he is placed in another school, would follow the feeder pattern, wherever the feeder pattern is in that district [A-643].

The Court found that because of the different feeder patterns and grade structures, such transfers have potentially double and triple segregative ramifications (A-1097).

Different Standards for Whites and Blacks.—Mr. Girard testified that all one needed to obtain a language transfer is to have a passing grade (A-605), but admitted that in instances of some white students the passing grade requirement wasn't even applied. Exhibit 51 contains numerous transfer applications including approved transfers of two white students from the East district whose marks were English 60, Spelling 60, Arithmetic 61, Science 60 and Geography-History 60 in one case, and English 60, Spelling 75, Arithmetic 60, Science 67 and Geography 60 in another. Each was permitted to transfer to South Park (A-607).

But a black student with a 75 grade average who wanted to transfer to Bennett for Hebrew; a black student with an 87 grade average who wanted to transfer to Bennett to take Russian; and a black student with an 84 grade point average who wanted to take academic courses at Bennett were denied transfers (Exh. 279; A-1692; A-606 *et seq.*). So embarrassing was this evidence that Mr. Girard tried to rationalize the denials of transfer on a basis that the only persons who may take a language at Bennett High School are those in the honors program, a fact hard to believe and which Mr. Girard later admitted that he didn't know (R. IV, 70 *et seq.*). This was proved erroneous when the witness Horace C. Johnson took the stand and testified that his daughter took Russian at Bennett and was not in the honors program (A-679).

School 16.—School 16 is at 939 Delaware Avenue between West Utica and Summer Streets (Exh. 1) in a predominantly white neighborhood. It became a black school. In 1966 the white percentage was 14.8 and 10.0 in October 1973 (A-1347).

The Board has seen to it that the white residents of the School 16 district would not have to attend this school. When HEW investigated and the Board was required to check its figures, it disclosed the numbers involved. Exhibit 280 is a report of March 10, 1972 relating to the number of children residing in the School 16 district who were attending Schools 30 and 38 (A-1699). On this date there were thirty-four students in School 30 from other districts, and twenty-six were white; and in the non-white were two Indians and one Oriental (A-1699). School 38 had fifteen students from School 16, of which fourteen were white and one from Pakistan. Mr. Girard testified that at School 30 twenty-two were authorized by his office and twelve were accepted by the school principal without downtown authorization.

These figures show that on one day, March 10, 1972, there were forty white students who should have been going to School 16 who were allowed to go to Schools 30 and 38—schools with white populations of 93% and 88.9% respectively as of October 1972 (A-1348). Here we have three schools affected—Nos. 16, 30 and 38. In October 1972 School 16 had twenty-five white students in a total enrollment of 214, or 11.7% white. Had the forty white students attended their proper school (No. 16), there would have been a great increase in the white percentage.

There is little doubt of how and why these white transfers were obtained. The testimony of Mr. Girard is much more informative than any argument which can be made:

> Q. All right. Now, down to the basis in your testimony relative to the reasons. Turning to Page 67 of the listed reason for granting this transfer was, quote, 'Social adjustment,' is that correct?
>
> A. That's correct, yes.

Q. Now, were you asked this series of questions and did you give these answers, starting at Page 67, line 13,

'Q. What was the social adjustment that was involved in permitting them to go to a school, —what was the social adjustment as of 1969 when they applied for this transfer, what was the social adjustment that permitted them to go to a school other than School 16 where they were supposed to go?

A. Well, again, —can it be off the record?

Q. No. I want this answered on the record.

A. Well, if you want an honest opinion—

Q. Yes, I want everything to be honest.

A. Here we have a family I would assume that it's pretty well, —a pretty well affluent family, they live on Oakland Place, and it's one of the nicest streets in the City of Buffalo.

Q. Right, Seymour Knox and the Bishop of Buffalo lives there, as well as others.

A. They have children at 30, and they live in School 16 District, and I think they just felt the children would perform better in an all white school in preference to an all black school.

Q. Certainly the fact that they are wealthy had nothing to do with the decision, did it?

A. No. I'm just going by the facts that I have. Oakland Place is a nice street and they probably weren't going to send their children to 16 School, you know.

Q. Then your best inference of the thing is that the principle [sic] reason that four white children did not want to go to School 16 but wanted to go to School 45 was because of the racial composition of 45 as opposed to 16?

A. It could be. If they felt that they are making a better adjustment at School 30 or School 45, they felt that maybe their children wouldn't adjust as well at School 16.'

Is that correct?

A. That's—

Q. That was your testimony at that time?
A. Yes. [A-618, 619].

School 54. —Each year the Board granted a number of white transfers out of No. 54 causing this one-integrated school to become segregated. It is now approximately 70% black and 30% white (PX6). Starting at page 220 of R. III and page 17 of R. IV, a number of the transfer requests are analyzed. The whole procedure is a sham. Any white parent who wanted to obtain a transfer was successful on the basis of any number of pretexts. Perhaps the best illustration is the "medical reason" offered on behalf of a third-grade student who should have gone to School 54 but sought a transfer. Starting at page 23 of R. IV, Mr. Girard was questioned about the medical report and then asked:

> Q. Isn't what the doctor's report is in effect saying is that it would be better this child went to a predominantly white school than a school that was in the range of fifty-fifty, white and black?
> A. Well, you could say that is what the doctor is saying, yes. [A-658].

Optional Attendance Areas

Judge Curtin found that the Buffalo Board used the classic device of optional attendance areas as a segregative device (A-1108; A-1111). Mr. Francis of HEW (A-1669) and the Commissioner describe such a device (A-1744).

Woodlawn Junior High School

The Court found that the Board willfully and intentionally caused Woodlawn Junior High School to be districted so as to be a segregated school (A-1094). Woodlawn is an all-black junior high school. The site was selected over much opposition because it would be segregated in the early 60's. It

was opened in 1964 as an all-black school. The Court declined to find the siting of the school as an act of segregation but found that the districting was such an act. Most of the facts are virtually undisputed and as stipulated (Stip. ¶¶ 24-33; A-88). The site of the school came under strong attack because its choice would make it difficult, though not impossible, for the school to be integrated (A-580). Some persons including blacks supported the site for economic reasons (R. III, p. 167) and because of assurances from Appellant Manch and a School Board member that the school would be integrated because it was only three blocks from Main Street which was a principal dividing line (Stip. ¶ 25(d); A-190). By 1964 the school was ready to open, and numerous plans calling for degrees of integration ranging from 70% white to 100% black were proposed (Stip. ¶ 26; Exh. 137). The plans for a school that would be integrated were quite feasible, and had the support of blacks and whites (A-590). Many other whites, however, opposed the plans for an integrated school, particularly parents from Schools 30 and 56, who presented a massive petition involving 10,000 signatures (See Exh. 263, p. 646 and Exhs. 122 and 123).

From among the many alternatives, six members of the Board agreed to accept Board Member Carmelo Parlato's plan which called for a virtually all-black school (A-587). The Stipulation §§ 27-28 contains the details of the final zoning and some of the salient characteristics (A-90). In Mr. Gardner's view (A-212), which was based on discussions with school personnel and Board members (R. II, 85), Woodlawn was "contrived" to be an all-black school. As former Board President Anthony Nitkowski later recalled: "Woodlawn never was to be an integrated school . . ." (PX37, pp. 6471-72, 6475) (Board meeting of January 28, 1970); and appellant Superintendent Manch's various remarks to the same effect quoted in ¶ 30 of the Stipulation.

Additionally, as Mr. Francis noted in his report, "the existence of an optional area in the northwest area of Woodlawn's zone serves to add to the segregation in that it allows the few remaining whites in the zone the opportunity to avoid Woodlawn in favor of the K-8 School No. 56" (A-1669).

When Woodlawn opened it was boycotted by black parents for a while. In 1966 Dr. Wright tried to revive the Lafayette-Woodlawn switch idea, but got nowhere (Exh. 63).

Woodlawn was and remains what the Board knew and intended it to be—a totally segregated school.

The Court found many other segregative acts, some of which are summarized in the following:

Vocational Schools: Of Buffalo's six vocational high schools, three (Seneca, McKinley and Hutch-Tech) were disproportionately white and one practically all black (Fosdick). Judge Curtin found discrimination against black admissions had caused segregated conditions to exist at a significant number of the schools (A-1117). Appellant Superintendent Reville admitted such discriminatory tests (A-964). Mr. Francis of HEW testified that interviews and tests were used to exclude blacks (A-563), and Commissioner Nyquist made such a "finding" (A-1745).

Staff Assignments: The Board in effect admitted a segregation of staff (Stip. ¶ 20; A-84), and the Court made such a finding (A-1118 *et seq.*). In *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971), it was stated that existing policy and practice with regard to faculty and staff are among the most important indicia of a segregated system. 402 U.S. at 18.

Optional Areas: Previously caused under transfers, the use of optional attendance zones was another segregative device found by the Court (A-1105 *et seq.*).

State Integration Mandate and Buffalo Responses: The open defiance of the Buffalo Board—aided in some instances by the Common Council—of the State directive to eliminate segregation is an independent principal segregative act (A-1131). This is detailed in POINT II.

Common Council Opposition: The appellants Common Council actively opposed integration by passing an ordinance to ban the use of portable classrooms, later declared unconstitutional, and opposed financing of additional middle schools and delayed the financing of West Hertel Middle. Judge Curtin found that "the Common Council's opposition to the Board's integration efforts has been a substantial factor in the continued and increased segregation in the BPSS. There can be no doubt that its actions were intended to achieve that result" (A-1148.9).

Schools 4 and 34: These schools were discussed in Judge Curtin's findings under transfers (A-1099 *et seq.*). One of the more blatant examples—the Board operated a white school (34) and a black school (4) next to each other in the same district under the same principal (Stip. ¶¶66-70; A-108).

There were a number of additional segregative practices established upon the trial upon which the Court did not single out for attention. For example:

Schools 50 and 24: School 50 was an antiquated school for educable mentally retarded, built in 1893. Until its closing under threat of an HEW fund cut-off, it was all black (Exh. 57). Instead of dispersing the students in the system, the Buffalo Board reopened a closed facility, School 24, and sent the children there, thus operating and maintaining a segregated school for black educable mentally retarded children; *Boundary Changes: Schools 9 and 62* (Stip. ¶¶77-81; A-105); *Constructing an Addition to All-Black School 39* (Stip. ¶89; A-107);

Increasing Majority Students at Southside Junior High School (Stip. ¶90; A-108).

There is little question that the BPSS was segregated by various devices which justified the Trial Court's finding and conclusion that appellants have violated the plaintiffs' Fourteenth Amendment right to equal protection under the laws by intentionally causing and maintaining a segregated school system (A-1190).

POINT II

The State defendants, having primary responsibility for education, are liable for denying equal protection to the children in the BPSS.

Education in New York is primarily a function of the State which finances a significant part of its cost. The appellants Commissioner and Board of Regents have broad powers over education and local school boards.

The Trial Court found in its Decision of April 30, 1976 that the State defendants continued segregation in Buffalo and denied children equal protection of the laws and "in some instances aggravated" segregation (A-1162). In the Decision of March 1, 1977 upon reconsideration, Judge Curtin concluded that "from the Regents' and Commissioner's actions over this extended time period that, contrary to the lip service they paid integration, they intended that the situation in Buffalo continue unabated" (A-1325). These findings "shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses" Rule 52, *Federal Rules of Civil Procedure.*

Judge Curtin had the opportunity to hear appellant Commissioner Nyquist upon the trial.

In other school desegregation cases State defendants have been held liable on both a derivative basis and on the basis of involvement in the local school boards' segregative acts. The Michigan State defendants, including the State Board of Education and the State Superintendent of Public Instruction, were found responsible in *Milliken v. Bradley*, 418 U.S. 3112 (1974) (*Milliken I*). The Supreme Court, in the course of holding that an interdistrict suburban remedy was not available absent evidence of another district's participation in segregation, noted that the State defendants had been held derivatively responsible for the Detroit Board's violations on the theory that actions of Detroit as a political subdivision were attributable to the State. 418 U.S. at 749. In the course of Chief Justice Burger's opinion he noted: "It held the State derivatively responsible for the Detroit Board's violations on the theory that actions of Detroit as a political subdivision of the State were attributable to the State. Accepting, *arguendo*, the correctness of this finding of State responsibility for the segregated conditions within the City of Detroit, it does not follow that an interdistrict remedy is constitutionally justified or required." 418 U.S. at 748.

At 418 U.S. 734 (footnote 16) the Court summarized the Sixth Circuit's (484 F.2d 215, 239-241) findings which included: (1) since the City Board is an instrumentality of the State and subordinate to the State Board, the segregative actions of the Detroit Board 'are the actions of an agency of the State;' (2) that the State legislation rescinding Detroit's voluntary desegregation plan contributed to increasing segregation in the Detroit schools; (3) that under State law prior to 1962 the State Board had authority over school construction plans and therefore had to be responsible for 'the segregative results.'

The Sixth Circuit opinion sets out various portions of the District Court's conclusions relative to State involvement with education; under the United States and State Constitutions, responsibility for educational opportunity is on the State; constitutional obligation toward all children is shared by the State with local boards; general supervision is vested in the State; the State specifies subjects taught, hours, days of school; the State reimburses transportation. 484 F.2d 239, 240.

In the present case the State appellants are responsible upon several grounds:

1. The Commissioner and Board of Regents have the responsibility for the schools and are therefore involved directly and indirectly in the City's segregative acts.

2. The conduct of the State appellants over the years condoned and promoted the segregative acts of the City appellants.

3. The acts of the State—*e.g.*, approving the construction and districting of segregated schools, reimbursement of transportation of students for segregatory purposes, enactment of legislation—also contributed to segregation in the BPSS.

The Ohio State Board of Education and State Superintendent of Public Instruction were held responsible for segregated schools in Columbus, Ohio in the well reasoned opinion of District Judge Duncan. *Penick v. Columbus Board of Education*, (U.S.D.C. So.D. Ohio, E.Div., March 8, 1977). Starting at page 64 of the opinion, the Court stated that the law of Ohio requires that the State Board of Education act to assure that school children in the various local school districts enjoy the full range of constitutional rights. The Court's findings of apparent indifference to constitutional duties ring familiar:

> The facts of this case offer no satisfactory reason for these state officials' failure to perform their duties as is advised by the Attorney General. Mere 'suggestions' to the Columbus Board were not enough. These defendants cannot be heard to say that they could not understand their obligations; the Attorney General made those clear.
>
> Dr. Kenneth Connell, representing the Columbus Area Civil Rights Council, visited the offices of the State defendants in the spring of 1971 and requested that action be taken regarding the Columbus schools. No action was taken. As I understand the state defendants' argument, they claim they would have investigated had Columbus school officials so requested. This position borders on the preposterous . . .
>
> . . . .
>
> The state defendants are to be commended on the accumulation of data, advisory resumes and personnel to be used for desegregation . . . Information was provided to local districts, and rather gentle persuasion employed to encourage desegregation. But some firm action is needed when the horse won't drink the water.
>
> The failure of these defendants to act, with full knowledge of the results of such failure, provides a factual basis for the inference that they intended to accept the Columbus defendants' acts, and thus shared their intent to segregate in violation of a constitutional duty to do otherwise [*Penick* at 66 and 67].

The record in the present case contains significantly more evidence than in Columbus of the State appellants' involvement with the actions of the Buffalo School Board and their implied consent to continuance of segregation in Buffalo.

The Ohio defendants were also found responsible in the Cleveland case in *Reed v. Rhodes*, 422 F.Supp. 708 (N.D. Ohio

1976). Here, too, the Ohio State Board of Education had made numerous statistical and evaluative reports, but the lower court found that the State had failed to enforce minimum standards mandated by statute. Ohio knew Cleveland's segregated schools were "demonstrably inferior." Also, the Court in *Reed* emphasized that, wholly apart from their independent Federal constitutional obligations, State defendants had ample authority and the duty to correct the segregated conditions. Continued support of the segregated system of public schooling was in and of itself an independent violation of constitutional rights: "State support of segregated schools through any arrangement, management, funds, or property cannot be squared with the 'Fourteenth Amendment's' command that no state shall deny to any person within its jurisdiction the equal protection of the laws." *Cooper v. Aaron*, 358 U.S. 1, 19 (1958).

What arguments do the briefs of the State appellants make to be excused of responsibility for the BPSS? The State appellants' response is along two principal lines. First, repeated "policy statements" supporting integration, and frequent "attention" to the matter, suffice to relieve the Commissioner and Board of Regents of any liability. Second, that the Trial Court used an improper standard in drawing an inference of segregative intent against the State appellants. The second argument is answered in POINT III. As regards the first contention, the Sixth Circuit's words in *Milliken I* are pertinent:

> Defendants seek to insulate themselves from remedial action by federal courts by pointing to the long standing public policy of Michigan, as expressed in its statutes, of integration of public education. However, this court is not blind to the fact that governments can act only through the conduct of their officials and employees and that unconstitutional actions of individuals can be

> redressed. See, *e.g.*, Clemons v. Board of Education, 228 F.2d 853 (6th Cir.), cert. denied, 350 U.S. 1006, 76 S.Ct. 651, 100 L.Ed. 868 (1956) [484 F.2d at 242].

The New York State appellants are in effect asking this Court to insulate them from remedial action because the Regents can point to statements favoring integration and the Commissioner to his correspondence to the Buffalo Board. The Trial Court made short shrift of such defenses: "The Regents' continued reliance on their plethora of policy statements urging an end to school segregation is disingenuous. It hardly needs restating that actions speak louder than words" (A-1325); "The Commissioners' actions over those ten years amount to a mountain of paper work with little substantive results." (A-1162).

In summarizing the State appellants' involvement, the Trial Court made these findings:

> The State defendants' attempt to wash their hands of any involvement in the segregation that characterizes the BPSS, by claiming they have done all that is legally required of them, is similarly unpersuasive. Nothing could have encouraged the City defendants' procrastination and recalcitrance more than the lack of effective action by the State defendants. In the final analysis, the State defendants are entrusted with the authority over and responsibility for the educational system in New York State. They must be held accountable for their actions and omissions that allowed and encouraged the BPSS's increasingly severe segregation [A-1169].
>
> The court could only conclude from the Regents' and the Commissioner's actions over this extended time period that, contrary to the lip service they paid integration, they intended that the situation in Buffalo continue unabated [A-1325].

The grounds for holding the State appellants liable go beyond a mere principal-agent type of derivative responsibility referred to in part in *Milliken I* and *Penick* (Columbus) above. There is and should be responsibility on the basis of derivative liability because education is a state function and a local school board is an extension of the State. However, the close association with, and tolerance by, the appellants Commissioner and Regents, together with their conduct under the circumstances, is more than sufficient to sustain a more direct type of derivative responsibility in this particular case.

In commenting upon the State appellant's liability, Judge Curtin, in *dictum*, stated:

> It may be, as the Regents and the Commissioner urge, that when state officials have been completely uninvolved with a school district, they should not be held liable for segregation that exists in that school district [A-1324].

Appellees do not agree with this gratuituous comment but suggest it is impossible, especially in New York, for State officials having responsibility over schools to be "completely uninvolved." However, no reasonable reading of the record in this case could lead to the conclusion that the State appellants were "uninvolved."

What the Record Shows as to the State's Involvement

For years since the mid-1960s, the Commissioner's office and the Regents were completely aware of serious segregation in the BPSS, that it was getting worse each year, had a detrimental effect upon the children and was a denial of equal protection.

Commissioner Nyquist, called as a witness by appellees, was being cross-examined by Mr. Gregory, City appellants' attorney, upon the subject of acts of *de jure* segregation by the Buffalo Board when he answered these questions:

> Q. What specific affirmative actions of the Board were you referring to in your earlier testimony when you said that the actions of the Board violated the Regents' policy?
>
> A. Well, by not doing nothing [sic]. That is an action too.
>
> Q. I beg your pardon?
>
> A. By not doing anything, by doing nothing.
>
> Q. All right.
>
> A. Not doing anything is an action and by no means not doing anything is certainly not compatible with Regents' policy of encouraging and doing something about racial integration [A-789 and 790].

This is the same Commissioner who now argues that he should not be liable for *his* inaction!

Dr. Kenneth Clark, the renowned sociologist who testified in *Brown*, and has been a member of the Board of Regents since 1968 (A-893), was also a witness called by appellees. He explained that he had complained to the Board and Commissioner over and over about segregation, especially in Buffalo (A-906). He testified: "That we are permitting local School Boards to defy the Constitution of the United States, the laws of the State and the directives of the Commissioner with impunity" (A-906). As regards the pace of integration in Buffalo, "I have raised that question with my colleagues and the Commissioner so often . . . I would say '*ad nauseam*' " (A-913). When questioned by the Court, Dr. Clark said, "I many times mentioned Buffalo as a long standing example and probably the longest standing example of a Commissioner's directive being defied, starting with Commissioner Allen" (A-915).

The State appellants' attorney, Mr. Panfil, inquired about the Regents' duties:

> Q. No. I am asking you your concept, Doctor, the dissemination of education as charged to the Board of Regents under the Statutes of the State of New York, does that include the concept here of preventing segregation in the schools, . . .
>
> A. I don't think there is any question about it.
>
> Q. You don't think there is any question about it?
>
> A. That the Board of Regents is the body charged with the responsibility of governance of education in the State and there is no question that part of that responsibility has to be to see that the laws related to education are not defied [A-930].

Upon questioning by the City appellees' attorney, Mr. Gregory:

> Q. . . . what is it that you base the fact that the Buffalo Public School System is unconstitutionally segregated?
>
> A. . . . First [referring to former Commissioner Allen's directive in mid-1960] . . . it was a holding that the schools were segregated . . .
>
> Nyquist describes a number of things which he did beyond Allen and in effect said the Board is telling us to go to hell, you know, and it was at that point that I say 'Look, a public body cannot afford to sit back and be quiet' . . . [A-942, 943].

This evidence was not disputed by any witnesses called by appellants. The Chancellor of the Board of Regents, Joseph W. McGovern, testified on behalf of the State appellants but was not questioned regarding the BPSS or the conduct of the Commissioner or the Board of Regents *vis-a-vis* Buffalo (A-973 *et seq.*). Regent Genrich was at the trial and present during at least part of the testimony of Dr. Clark (A-927, 1.19), but he did not testify.

The powers of the Board of Regents and the Commissioner of Education are described in Judge Curtin's Decision and the stipulation between the parties (A-1133; A-120). Full power over education is constitutionally vested in the State and specifically in the Department of Education which "is charged with the general management and supervision of all public schools and all of the educational work of the State," *N.Y. Education Law*, Sec. 101. The appellant Board of Regents is the governing body of the University of the State of New York, *N.Y. Education Law*, Sections 201 and 202. The Board of Regents is also the statutory head of the Department of Education, and the Commissioner of Education, who serves at the pleasure of the Board of Regents, is the chief administrative officer of the department, *N.Y. Education Law*, Sections 101 and 303.

The Commissioner has the responsibility for enforcing all laws relating to education and for executing all educational policies adopted by the Board of Regents. He has general supervision over all elementary and secondary schools, including those in the public school system of Buffalo (Stip. ¶ 132(b); A-120). The Commissioner is also granted judicial authority to hear appeals from aggrieved persons, and his decision "shall be final and conclusive, and not subject to question or review in any place or court whatever," *N.Y. Education Law*, Section 310 (A-1134); and the Regents may adopt rules giving the Commissioner such additional powers and duties as may be required for the effective administration of the State system of education *N.Y. Education Law*, Section 301.

Section 306 of the *N.Y. Education Law* gives the Commissioner the power to remove any school officer or member of a board of education who willfully disobeys any decision

or order of the Commissioner of Education and to withhold from any district or city its share of the public money of the State for such disobedience (Stip. ¶ 132(c); A-120).

The events, starting from the early 60s, are strong evidence of the State appellants' misconduct which contributed to segregation in the BPSS. On October 28, 1963 the then Commissioner, James E. Allen, at a meeting of New York State School Boards Association, advised local boards of their responsibility regarding segregated schools which were a detriment to equal educational opportunity. Commissioner Allen closed his address with this injunction: "Therefore, if appropriate local action is not forthcoming, if adequate plans are not made and actively pursued by local authorities, the state, in faithfulness to its responsibility, will have no choice but to act to move to fill the vacuum created by inertia or postponement in the exercise of local responsibility" (A-1506). Further, under the heading, "Support of Plans for Integration," Commissioner Allen said that "the full equalization of educational opportunities for minority groups and other children requires racial integration in the schools" (A-1507). The appellant Superintendent Manch was aware of this and brought the remarks to the Buffalo Board's attention no later than its meeting of February 26, 1964 (A-1506).

During the ten year period between October 28, 1963 and October 1974 when the case was tried—and even until this Court's Decision of April 30, 1976—at no time did the State appellants, Commissioner or Regents, take any meaningful steps to fulfill the State's responsibility in spite of yearly increases in segregation in Buffalo, fully known by the State appellants.

A proceeding was instituted before Commissioner Allen which resulted in the *Yerby Dixon* decision on February 15,

1965 wherein the Commissioner ordered the Buffalo Board and Superintendent Manch to submit "a plan for the progressive elimination of racial imbalance, including the steps to be taken in this direction in 1965-66" (A-121).

Time goes on and practically nothing is done. There is really no plan. New techniques to segregate Buffalo's students—language transfers, districting of Woodlawn, transfer of students, vocational tests for blacks, ordinance against portable classrooms, etc.—are devised and employed. On June 7, 1968 the Buffalo Corporation Counsel inquired whether Commissioner Allen had really directed the Buffalo Board to eliminate racial imbalance. The Commissioner responded by a June 21, 1968 letter tracing the exchange since 1965 and concluded by stating that the Buffalo Board had the obligation to move as rapidly as possible (A-1630).

The Buffalo Board continued to file "reports" alleging "progress," but in June 1969 appellant Nyquist, then Deputy Commissioner, knew the Buffalo program was unsatisfactory. In the course of discussing the Buffalo problem and certain trends he said: "Clearly unless there is an acceleration in the implementation of plans for achieving quality integrated education in the Buffalo School System, the present trend may become irreversible" (A-1721).

Segregation in Buffalo increases. The Board continues to take actions to perpetuate and aggravate separation of the races. The State appellants permit its continuation. There is apparent loss of interest in the Commissioner's office even though it has full knowledge of what is going on. Again the burden to come forward devolves upon appellees NAACP and CCHR who call the Commissioner to task in a letter-petition of December 13, 1971 to Mr. Nyquist (Exh. 102; A-1436) outlining the seven years of frustration with the Buffalo

Board and the Commissioner's office since the '65 *Yerby Dixon* directive. "The situation has not been an accident, and its perpetuation, permitted by you, is no accident." The letter is a bill of particulars against appellants and highlights these events, among others: in 1964, "drawing the boundaries of Woodlawn Junior High School to make it all black; the 1966 declared policy that white children will not be transported to black schools (A-1437); the 1967 rejection by the appellant Superintendent Manch of all twenty-seven recommendations for integration of an Advisory Council except to use portable classrooms (A-1438); the appellant Common Council enacts an ordinance in 1968 to ban portable classrooms (A-1439), later declared void in court (A-117).

The December 13, 1971 letter "awakens" the Commissioner who writes on January 20, 1972 to the President of the Buffalo Board (Exh. 103; A-1444). In this letter the Commissioner makes damaging admissions:

> Testimony in Lee v. Nyquist* case tried in 1970 in the U.S.D.C. W.D.N.Y. showed that achievement scores in reading and arithmetic in the 20 most heavily black elementary schools in Buffalo were markedly lower than in the 20 most heavily white. There is further evidence that black children transferred to peripheral schools made greater gains in academic achievement than did black children remaining in the inner-city schools. Faced with the hard fact that segregation is more severe in Buffalo now than it was seven years ago, with over twenty schools more than 90% black, and twenty-nine schools 90% or more white, it is clear to me that only a new approach can equalize educational opportunity for the children of Buffalo [A-1445]

---

* Aff'd. 402 U.S. 935 (1971). Held Chp. 342 of N.Y. Laws of 1969, prohibiting assigning students or district lines to achieve racial balance is unconstitutional (A-123).

The Commissioner concluded by directing a report on a plan for Buffalo by February 15, 1972. This was adjourned but the Commissioner came to Buffalo and, in a historic press conference after meeting with the Board on February 21, 1972 (Exh. 105), was asked what he would do if the Buffalo Board refuses to "go along with the racial integration plan or a judicial decision of the Commissioner unless it was brought into the courts." He answered:

> There are two remedies in the law, and you can read the law as well as I can, when a board—see a school district or school board is an extension of the state. Education is a state function and when a board refuses to carry out educational policies the Board of Regents or the Commissioner of Education, the two remedies that are specifically stated are the withholding of state aid and the initiation of proceedings to remove the board and I hope we don't have to come to that [A-1452].

The majority of the Board regarded Commissioner Nyquist as an adversary (A-1461), and on March 22, 1972 outrightly refused to adopt a plan for integration and desegregation. The then president of the Buffalo Board, Mr. Arnold Gardner, eloquently stated during the meeting: "The day will come, I believe, when all those things, and others that this Board does and does not do, will be considered State action, *de jure* segregation in violation of a constitution" (A-1476).

What is the Commissioner's response? More meetings. More studies. More correspondence. But no action. No attempt to remove members of the Board. No withholding of funds. No proceedings in court or issuance of an order against the Board. Discussion. No action. Segregated schools continue. The Commissioner is fully aware of all of the devices being used to perpetuate segregation in Buffalo. It was not until after the trial in this case that the Commissioner

got around to issuing his order to show cause in January of 1975, containing the devastating summary of the unconstitutional acts of the Buffalo appellants and equally devastating knowledge on the part of the Commissioner and permitting the same to continue (A-1743). Although issued in 1975, there is still no resolution by the Commissioner's office. Yet the show cause order had been drafted in August of 1973 (Exh. 298; A-1707).

The Commissioner serves at the pleasure of the Board of Regents (A-799). He is their agent, and the Regents are equally responsible for the Commissioner's condoning segregation in Buffalo. He knew in March 1972 that the Buffalo Board was in willful defiance of his directive.

> Q. Yes, it was, was it not, as of the spring of 1972, following the March meeting of the Board, you regarded the conduct of the Buffalo Board as a willful refusal to obey your directive, isn't that true?
>
> A. Yes, and another tact was then desirable [A-804].

The stipulation agrees that:

> 137. The Commissioner is aware that the Buffalo Board will continue to do nothing to enforce the order of February 15, 1965 through June 30, 1974, when an elected board took offfice. The Commissioner has no evidence that the newly-elected board has complied or is planning to comply with the order.
>
> 138. The Commissioner has taken no steps since February 15, 1965, to remove any member of the Buffalo Board or any of its employees or to withhold funds; nor has he taken any steps to seek a court order compelling compliance with his order of February 15, 1965, although the Commissioner declared in a letter of January 24, 1972 (referenced in ¶ 18(b) of this stipulation) that 'segregation in [Buffalo] is more severe now that it was seven years ago.

> 141. Defendants Commissioner and Regents have approved the siting and construction of schools including Woodlawn and 39 which they knew would create, maintain, and perpetuate racial isolation and segregation [A-122].

How long would it have taken the Commissioner of Education or the Board of Regents to take corrective action if the BPSS had decided not to teach English or Math in its schools, or reduced the school year to 100 days? This was asked in the Trial Court which responded:

> It is significant when considering the protracted negotiations between the Board and the Commissioner's office, which continued to this day, to ponder the hypothetical situation posed by plaintiffs' counsel at the final arguments. If the Buffalo School Board had decided to shorten the State mandated 190-day school year (*N.Y. Education Law* Sec. 3204(4)(a)), on its own initiative, one would expect the State to react with great alacrity to enforce its attendance statute. Yet, this decade old integration mandate has been 'more honour'd in the breach than in the observance' (W. Shakespeare, Hamlet, I iv., fourteenth) [A-1162, 1163].

POINT III

Judge Curtin applied the proper tests in the finding of segregative intent on the part of all appellants.

Each set of appellants argues that Judge Curtin did not apply the proper standards when he concluded that both the City and State intentionally caused segregation in the BPSS.

Appellants' arguments proceed upon several incorrect premises. It is maintained, especially by the State appellants, that under no circumstances may the trier of the fact base "an

inference of segregative motive . . . solely from the impact of alleged omissions" (p. 28 separate brief). The essence of all appellants' arguments is that the omission to act may in no case be evidence of segregative intent regardless of the particular facts, circumstances or consequences. It is further argued that under no circumstances may the Court take into consideration the natural and forceable consequences on an official act or omission which results in public school segregation.

These "arguments" are overly simplistic and unfairly dissect the complete process involved in finding intent. Appellants' treatment of pertinent authorities is out of context in many instances, and appellants disregard the careful findings expressed in two decisions of the Trial Court.

Background

In *Keyes v. School District No. 1, Denver, Colorado,* 413 U.S. 189 (1973), the court held that an element of plaintiff's proof in a school desegregation case not involving statutory segregation was purposeful State action to effect segregation of the races. "We emphasize that the differentiating factor between *de jure* segregation and so-called *de facto* segregation to which we referred in *Swann* is *purpose* or *intent* to segregate," 413 U.S. 209. The Court also used such expressions as "purposeful State action" and "unlawful segregative design."

In essence, appellants are arguing that it is necessary to find racial animosity. It is appellees' position that the intent to be found is merely an intent to cause a separation of the races regardless of the reason or motivation of the responsible officials. In *Penick et al. v. Columbus Board of Education et al.,* .... F.Supp. .... (U.S.D.C. So. D. Ohio, E.Div., March 8, 1977, Civ. No. C-2-73-248), the Court analyzed this issue:

My review of the law convinces me that the plaintiffs need not prove that the defendants intended to do harm, or acted with ill will[3]. They need only prove that school officials intended to segregate. It is well within reason to believe that a person may intend to segregate or cause apartness for socially admirable reasons. It can be argued that many genuinely believed, perhaps some yet believe, that it is best to educate children with other children, administrators and faculty of their own race. Some may believe in complete sincerity that the total community good will be enhanced by segregation. As Mr. Justice Stewart wrote when he was a Circuit Judge in the case Clemons v. Board of Education of Hillsboro, 228 F.2d 853, 859 (6th Cir. 1956) (concurring opinion):

> The board's subjective purpose was no doubt, and understandably, to reflect the 'spirit of the community' and avoid 'racial problems' as testified by the Superintendent of Schools. But the law of Ohio and Constitution of the United States simply left no room for the board's action whatever [subjective] motives the board may have had.
>
> Intentional segregation of black school children by public officials is unconstitutional whether caused by those truly caring about blacks or those calloused to their concerns [*Penick*, pp. 46-48].

The Trial Court's Findings of Segregative Intent.

Subsequent to the Trial Court's Decision and Order of April 30, 1976, the Supreme Court in three cases, *Washington v. Davis, Austin* and *Village of Arlington* had the opportunity to explain segregative intent. Although Judge Curtin's Decision of April 30, 1976 was issued before these decisions, proper standards were applied. In addition, upon his own motion and that of appellants, Judge Curtin reconsidered in light of these cases and reaffirmed his findings of segregative intent.

With respect to the April 30, 1976 Decision, the Court was conscious of the importance of finding intent to segregate:

> The only question before the court is whether or not any or all of the defendants have acted in such a manner as to segregate the BPSS.... The question presented—whether or not the defendants intentially committed segregative acts affecting the Buffalo schools—is one that calls for the strongest emotions [A-1036]. Speaking of East High School, the failure to amend this policy—language transfers—"is indicative that the Board intended that that segregative effect to continue" [A-1079].
>
> . . . .
>
> Woodlawn was not a case of 'mere inaction . . . allowing a racially imbalanced school to continue, *Hart v. Community School Board, supra,* 512 F.2d at 48; rather, it is an example of blatant segregative intent with clear segregative results . . . The court finds that the Board willfully and intentionally caused Woodlawn Junior High School to be districted so as to be a segregated school. [A-1092, 1094]

On the subject of transfers the Court stated that "what is attacked is the knowing granting of transfers for specious or blatantly discriminatory reasons, that increases the segregation" (A-1103). Relative to optional districts: "Did the School Board intend the segregative result? We must conclude that it did" (A-1108). The Trial Court found that the State appellants shirked their responsibilities and intended to effect segregation and acquiesced in the Board's dilatory conduct (A-1155).

Judge Curtin's "meticulousness" in determining segregative intent is reflected in his refusal to find such intent in the siting of Woodlawn Junior High School (A-1086), the Mayor's appointment of Board member Williams (A-1164), the Common

Council's not leasing Bishop Ryan High School (A-1150) and failure to go forward with the new East Side High School (A-1152) even though all of these matters had a segregative racial impact. The particular conclusion upon the siting of Woodlawn illustrates the Trial Court's careful approach: "Although it is a close question, it is the court's opinion that this conflicting evidence is not sufficient to show racially segregative intent on the part of the City or State defendants with respect to the siting of Woodlawn Junior High School" (A-1086). As regards Bishop Ryan: "The evidence is not sufficient to find that the Common Council's refusal to even negotiate . . . was substantially motivated by segregative intent" (A-1150).

There was no need to grant appellants' motion to reconsider under *Washington v. Davis*, *Austin* and *Arlington* because the Trial Court had originally made proper findings. However, Judge Curtin, *sua sponte*, asked for briefs after *Austin* and granted the motion for consideration. In the Decision of March 1, 1977 (A-1305) the Trial Court reaffirmed its findings of segregative intent.

The Meaning and Significance of *Washington v. Davis, Austin* and *Arlington*.

In *Austin Independent School District v. United States*, 97 S. Ct. 517 (1976), the court reversed and remanded directing that the decision be reviewed in light of *Washington v. Davis*, 426 U.S. 229 (1976). The reason for remanding in *Austin* is because the Fifth Circuit rested its finding of racially discriminatory intent solely upon the assignment of students to neighborhood schools in segregated neighborhoods.

Shortly after the *Austin* remand the Supreme Court handed down *Village of Arlington Heights v. Metropolitan Housing Development Corporation*, 97 S. Ct. 555 (1977), which expand-

ed the discussion in *Washington v. Davis* relative to the nature of segregative intent and the type of analysis the trier of fact must make in drawing the conclusion particular conduct was motivated by segregative intent.

Appellants seem to argue that a Trial Court may not consider disproportionate racial impact, or the natural and foreseeable conduct of an official's acts or commissions, as evidence of segregative intent. This is not the holding of *Arlington*. While a finding of segregative intent may not be sustainable where an official action, otherwise neutral, results in racially disproportionate impact (*e.g.*, *Austin*, neutral neighborhood assignments), this is not to say that such impact, known to officials, may not be probative upon the issue of segregative intent. The Court so stated in *Arlington*: "Determining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available. The impact of official action . . . may provide an important starting point" 97 S. Ct. at 564.

Arlington is significant in a number of respects:

1. The entire Court, including Justices Marshall and Brennan, concurred in parts I-III of the decision.

2. The Court cites *Keyes* as the pertinent school case.

3. This Court's decision in *Kennedy Park Homes Association, Inc. v. City of Lackawanna*, 436 F.2d 108 (2d Cir. 1970), cert. denied, 401 U.S. 1010 (1971), was approved. The late Justice Clark's words in *Kennedy Park* are apropos here:

> While the defendants-appellants attacked the findings as being based on inference and implication, we find after careful study that they are fully supported by the

> record and lead inescapably to the conclusion that racial motivation resulting in invidious discrimination guided the actions of the city . . . This panoply of events indicates state action amounting to specific authorization and continues encouragement of racial discrimination, if not almost complete racial segregation. [436 F.2d at 109]

Kennedy Park affirmed Judge Curtin's finding relative to discrimination in the City of Lackawanna, New York. In this case involving the BPSS, the proof of purposeful State action is much more powerful than even *Kennedy Park*.

The appellants also claim that Judge Curtin applied a relaxed standard under this Court's decision in *Hart v. Community School Board*, 512 F.2d 37 (2d Cir. 1975), in which reference is made to the "natural and foreseeable consequences" of official action. This Court in *Hart* made careful findings of discriminatory intent and held that a confluence of causes resulted in segregative intent. However, the collection of specific devices which the appellants used to effect and maintain segregated schools in Buffalo is much easier to identify and factually more extensive than in *Hart*. Neither *Washington v. Davis*, nor *Arlington*, nor *Austin* disapproved *Hart*, nor do they hold that such consequences are not to be considered. While "natural and foreseeable consequences" is a phrase generally used in tort litigation, it expresses a concept to be considered in evaluating intent. It is certainly relevant to know that separation of races is the natural and foreseeable result of particular official conduct.

Judge Curtin's reconsideration Decision of March 1, 1977 states that, to the extent that the *Hart* standard suggested that mere cause and effect, mere analysis by way of "reasonable and foreseeable consequences" amounts to a finding that disproportionate impact is sufficient to impose liability, it is refuted by *Washington v. Davis* and *Arlington*. We suggest it was

not necessary for Judge Curtin to make this particular explanation because in *Hart* it was not mere disproportionate impact, or mere cause and effect, but a confluence of causes which the Court held denied equal protection.

To summarize:

(a) The Trial Court's findings are factual inferences which cannot be set aside unless clearly erroneous.

(b) In both Decisions the appropriate *Washington v. Davis* and *Arlington* law is applied.

(c) In *Arlington*, Justice Powell stresses that *Washington v. Davis* merely "*reaffirmed* a principle well established in a variety of contexts. *E.g.*, *Keyls* . . ." 97 S. Ct. at 563 (emphasis added).

(d) *Credibility* is a major factor and must be left to the trial judge, especially in dealing with so difficult a matter as intent, where the motivation to cover up an improper intent is so high, and where mixed motives are so common.

(e) The *pattern* is also important, because of the complex casual relationships which exist in a large metropolitan school system.

(f) Intent as to some matters justifies a finding of a similar intent as to others, as *Keyes* indicated. As to some matters, segregative intent was virtually admitted—staff, vocational schools, portable classrooms. In some instances—*e.g.*, deferring West Hertel bond issue, portable classrooms—the impact was modest (or temporary) which shows the Trial Court did not rely on impact alone.

(g) The Trial Court, experienced in finding intent (*Kennedy Park*), had substantial evidence of segregative intent in many aspects of the BPSS having a system-wide impact.

In closing may appellees suggest a simple example to answer the contention that State or City inaction cannot be the basis for a finding of segregative intent. Hundreds of white children living in the East High School district were granted "language" transfers to other schools. Contrary to Board policy, Polish, Russian and Italian were not offered at East after 1960. Is this not inaction? A principal appellant, Commissioner Nyquist, best put the lie to such a claim:

> A. Well, by not doing nothing, that is action too.
> Q. I beg your pardon?
> A. Not doing anything is action. [A-789]

POINT IV

Segregated housing, caused by City, State and Federal action, contributed to segregated schools. This official action imposes a further duty upon appellants to desegregate the BPSS.

The City appellants pleaded one affirmative defense: "SEVENTEENTH: That within the BPSS isolated examples of racial imbalance admittedly exist, but these are not the result of School Board policies but rather are the result of housing patterns beyond the control of the defendants herein" (A-78). The State appellants asserted a similar defense in paragraph 4 of their answer (A-67).

It is appellees' position that the considerable evidence of City, State and Federal discrimination in housing was not only relevant to refute these defenses but, under the circumstances of the nature and effect of the discriminatory housing practices in Buffalo, imposed a further and separate duty upon appellants to remedy the segregation of schools necessarily resulting from such housing discrimination. The

Trial Court's findings upon the housing evidence are set out in pages A-1170 to A-1189 of the Decision of April 30, 1976 and concluded with this paragraph:

> The court finds, therefore, that the defense of residential segregation, like the 'racially neutral' neighborhood school policy defense to which it is intimately related, is essentially a smokescreen. Furthermore, the court finds that the City defendants' past action and inaction have, to a substantial degree, caused, exacerbated or maintained the segregated housing conditions, and are separate and independent alternative grounds for holding them constitutionally liable for the segregated condition of the schools in Buffalo [A-1188, 89].

In *Penick v. Columbus Bd. of Educ.*, ... F.Supp. .... (S.D. Ohio, E.Div., Civ. C-2-73-248, March 8, 1977), the court in its discussion of residential segregation stated that "the interaction of housing and the schools operates to promote segregation in each" (p. 58). After noting that school authorities could not fully cure the evils of residential segregation, District Judge Duncan found:

> I do believe, however, that the Columbus defendants could and should have acted to break the snowball created by their inaction with housing. That is, they could and should have acted with an integrative rather than a segregative influence upon housing; they could and should have been cautious concerning the segregation influences that are exerted upon the schools by housing [*Penick* at p. 58].

Upon this case appellees offered much proof of discriminatory housing policies. Mr. Martin E. Sloane, General Counsel of the National Committee Against Discrimination in Housing, with considerable experience in working with the U. S. Civil Rights Commission's major study of racial isolation in public schools (A-854), testified how in

the 1930s the F.H.A.—and later the V.A.—became the leading exponent of housing segregation (A-860). Various provisions of the F.H.A. underwriting manual (Exh. 228; A-1634) such as deed restrictions (A-863) effected "protection from adverse influences," a euphemism for "keep the niggers out." It was not until 1948 that the policies were effectively withdrawn (A-865). Mr. Sloane also explained how local municipal housing authorities and the Public Housing Administration fostered discrimination (A-871).

In Mr. Sloane's opinion it will take generations to undo the effect of official housing discrimination (A-873), and the link between residential segregation and segregated schools is "very, very strong" (A-873).

The following presents an illustrative summary of some of the appellees' housing evidence:

1. *Buffalo Municipal Housing Authority* (BMHA). Table 17 and map from the Trial Court's findings (A-1177, 78) set out, next illustrates the segregated public housing projects in Buffalo. Appellees' witnesses traced the history of the "Negro Projects" and failure of BMHA to follow proper transfer and assignment policies thereby assuring the continuation of these segregated projects (A-842 *et seq.*). The newspaper articles of the early forties (Exhs. 213 and 215; A-1632, 33) show City officials responded to community pressure: "Stop Plans for Negro Housing—11 Groups Declare South Buffalo is United Against Okell Street Site." Typical are the words of one protest leader . . . "Of course the Negro workers should be taken care of but this is not the place. There are none living or working here now . . ." (Exh. 215, Col. 2).

2. *The City's Containment of Thousands of Black Families Displaced and Relocated by the Ellicott Urban Renewal Project.*

In the 1950s the City relocated in the Masten District practically all of the black families dislocated by the Ellicott Urban Renewal Project. Exhibit 230 set out in the next pages, plots this on a map of the City. It is interesting to compare this evidence with the location of most of the all-black schools shown on Exhibit 1 set out earlier. Residential discrimination was admitted by the City in its Model Cities application:

> Although at the time there was a sufficient number of adequate housing units available, the relocation program failed to take into account the residential exclusion problem which restricted the movement of non-whites to the Masten and Ellicott Communities. This restriction, though unwritten and unstated, nevertheless, reduced the supply of housing units available to the non-white families displaced by the Ellicott Project to an unsatisfactory level. This, relocation of the Ellicott residents was accomplished by increasing the density of the remainder of the Ellicott Community and the lower Masten area mainly by virtue of illegal conversions of single and two, multi-family structures and by the doubling up of families in existing units. The impaction of these two areas in turn led to the speeding up of the processes of blight formation in the remainder of the Ellicott and Masten areas [PX 260, pt. III, at 25, 26].

3. *Failure of the Appellant Common Council to Adopt an Ordinance to Proscribe Discrimination in Owner-Occupied Two-Family Homes.*

In Buffalo over 90% of the rental housing market available to minorities consisted of two-family homes which had owner occupants (Exh. 251; A-831). Buffalo represented in its Model Cities' application that it would have a total coverage

fair housing ordinance with machinery for its vigorous enforcement (Exh. 260; A-1662). This ordinance was not adopted (A-842) in spite of an opinion of the City's Corporation Counsel that the Common Council had the power and authority to enact same (Exh. 176; A-1603).

The evidence firmly established that the Federal, State and City agencies have effected residential containment affecting school segregation which appellants must remedy.

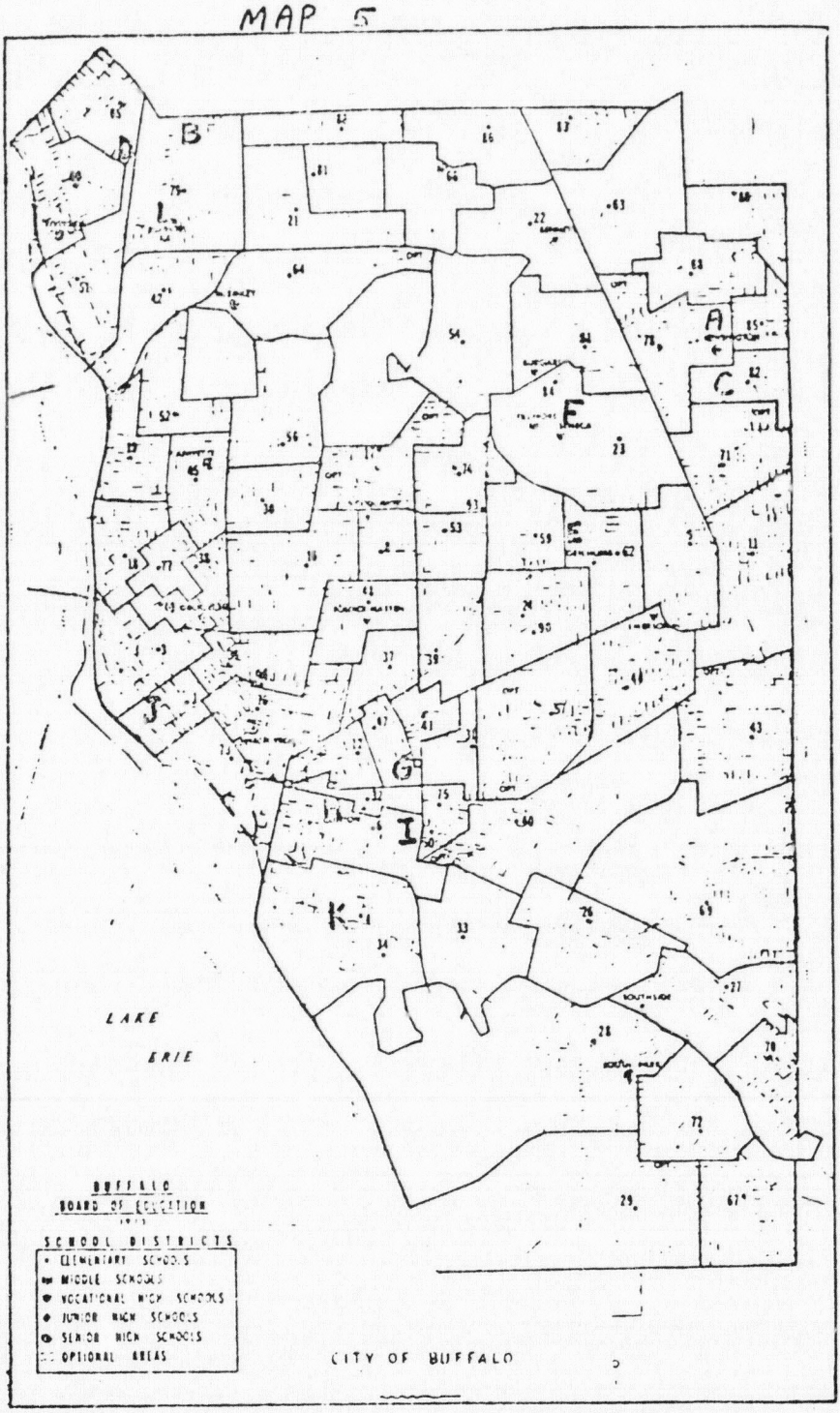
TABLE 17

PROJECT NAME	UNITS	RACIAL MAKEUP	LOCATION
Kenfield	658	3% black	A
LaSalle	206	3% black	B
Langfield	594	6% black	C
Shaffer	233	3% black	D
Ferry-Grider	210	6% black	E
Kensington Heights	371	6% black	F
Willert Park (including extension)	472	100% black	G
Ellicott Mall	590	99% black	H
Talbert Mall	763	99% black	I
Lakeview	668	23% black	J
Commodore Perry	772	19% black	K
Jasper Parish	212	13% black	L
Commodore Perry Ext.	472	58% black	K

SOURCE: Record, Vol. V, at 125-128.

[Location of these projects shown on map 5, infra].

MAP 5

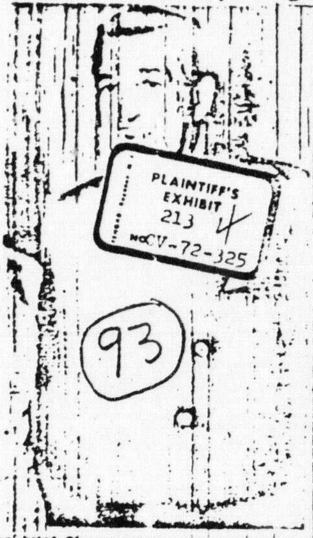

B
A
C
E
J
G
I
K
LAKE
ERIE
BUFFALO
BOARD OF EDUCATION
SCHOOL DISTRICTS
ELEMENTARY SCHOOLS
MIDDLE SCHOOLS
VOCATIONAL HIGH SCHOOLS
JUNIOR HIGH SCHOOLS
SENIOR HIGH SCHOOLS
OPTIONAL AREAS
CITY OF BUFFALO

Plaintiffs' Exhibit 213.

Courier BUFFALO EXPRE[SS]

BUFFALO, N. Y., FRIDAY MORNING, JULY 25, 1941.

[A]ttends Drive's Opening



PLAINTIFF'S EXHIBIT 213 No CV-72-325

93

...ng, noted Chinese aviatrix, was guest of honor ...roon in Hotel Statler opening the drive of Buffalo ...a Relief, Inc. She is seen with James G. Baines.

200-UNIT NEGRO PROJECT HERE GETS APPROVAL

Construction of dwellings for defense workers to be handled by MHA

Courier-Express Washington Bureau

Washington, July 24—Assignment of a 200-unit defense housing project for Negro workers in Buffalo was announced today by John M. Carmody, federal works administrator. Construction will be handled by the Buffalo Municipal Housing Authority, working through the U. S. Housing Authority.

Carmody announced no site selection, but it was said that at least three sites are under consideration. Representative Alfred F. Beiter, Buffalo Democrat, declared that he would press for selection of the Willert Park site for the new project. There is some available land there and more can be acquired with little difficulty, he said.

Beiter pointed out that Negro workers of Buffalo have expressed a preference for an addition to the Willert Park project and that extension of the present development would tend to ease operations. The present Negro housing development there, he declared, is a model of efficiency and he felt that extension of that project would provide housing of a high standard.

Carmody said work will be started as soon as architectural designs can be finished and advertisements placed for bids.

PURTILL FOUND GUILTY

Postoffice clerk to be sentenced August 4th

Special to The Courier-Express

Jamestown, July 24—After ten hours of deliberating, a jury in federal court here tonight found James J. Purtill, 48, former Buffalo postoffice clerk, guilty on nine counts of delaying the mails. The verdict climaxed a three-day trial. Sentence is to be imposed at Buffalo August 4th.

The defendant contended yesterday while on the stand that he had been framed.

HEALTH IN SLUM AREA REPORTED ABOVE AVERAGE

Report says publicity given Little Hollywood unwarranted but board disagrees

The publicity given Little Hollywood ... area in the ... was "not ... warranted by the ... Dr. Frank Walpry, health ...

...teful ...Help, ...rts ...ult vest...ries,

Plaintiffs' Exhibit 215.

...reported

Vacation

...may be light ... doesn't even ... charged with ... Erie County ...racuse-bound ...g a vacation ... back at his ... offices until

...rk, who, when ... announced, ...robably would ... hand on ... the banquet ... of the faith... make the trip. ...rick has ar... to speak. The ... advised, are ...th Chairman ... floor for 20 ... eight or ten ...aking for ...

...ught 60 Days

... 14.—Arrest... ...hase by ... ar, Melvin ... Rose st. ... ving a ... county jail ... sentence was ...dge Philip J. ...d 10-day ... d two other ... t when they ...ice Headquar... with reckless ... he had only a ...ermit and had ... plates from a

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...torcycle as he ...e Street near ...ay to work in ...t plant this ...cGuire, 44, of ..., is in a seri... ...ward J. Meyer ...with a brain ...ple skull frac... ...tions.

...re said that ...to walk across ... between two ... he was struck ... operated by ...Sliye, Charles ... Norwalk ave.

...ecruits ...arands

...ruits now are ...training on ...ing to Pri... ...gh of 3rd ...s of the ...esday to ... a ten...

...basis when ... recommendations ... made, the posts should instead be filled first by promotion tests, complete approval of the commission's plan was expressed by the presidents of the two largest employes' groups, James E. D'Arcy of the Competitive Civil Service Association and William J. Kelly of Council 110, Civil Service Employes of New York State.

New Title Suggested

Mr. D'Arcy recommended that the division secretarial posts be reclassified under a new title, so that veteran divisional employes would have an immediate chance at them through competitive promotional examinations. Division secretaries traditionally have been political appointees serving by favor of the party in power.

Former Councilman Richard A. Canllin, who sponsored a charter amendment five years ago to extend the protection of competitive classification to those in the non-competitive and labor class, also endorsed the plan.

Councilman James L. Crane of the Delaware District pointed out that the Civil Service system was ... benefit of the ... employe, ... the reason ... exercised in ...

PLAINTIFF'S EXHIBIT 215 NO. CV-72-325

...ratifications ...'s plan, the reclas... ... staggered over a period beginning next March and ending Aug. 1, 1942, and this was the only phase to which Councilman Anthony F. Tauriello of the Niagara District objected. He urged it take effect immediately.

Chairman Daniel B. Streeter of the Civil Service Commission, who presided, explained that the commission had considered carefully every possible angle in the timing of the changeover, and the decision to put it into effect next year, although providing for it now, seemed the most feasible.

"All I've been wondering is why you didn't do it right away and get it over with," was the comment of Mrs. Thomas L. Holling when Chairman Streeter, noticing her in the rear row, invited her to speak. Mrs. Holling explained she was attending ... in a personal capacity.

Unlicensed Driver Placed on Probation

95

Pleading guilty to one of two charges of driving without a license, Blase Milici, 18, of 123 Seventh st. was held for a Probation Department report Wednesday and later returned to City Judge Joseph J. Kelly's courtroom for sentencing. A 30-day term was suspended and he was put on probation for a year. Judge Kelly dismissed the second charge and suspended sentence on an additional charge of driving an unregistered car.

Artificial Leg Donated

SCRANTON, Aug. 14 (AP).—Eager to aid defense, Mrs. Mary Ligi donated a ... artificial aluminum ... to be a ... collection

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Stop Plans for Negro Housing

11 Groups Declare South Buffalo Is United Against Okell Street Site; Mass Protest Will Be Held

Officials of eight South Buffalo business and civic groups and three labor unions combined today in an appeal to Senator James M. Mead and Representative John C. Butler to secure abandonment of a plan to locate a federal defense-housing colony for 200 Negro workers in Okell Street near South Park Avenue.

Meanwhile, the Rt. Rev. John J. Nash, pastor of Holy Family Church, sent the following reply to a request from Representative Butler, in whose district the Okell site is located, asking whether or not the clergyman approved the project:

"The Okell Street project threatens to destroy the work of 40 years to build up the South Park district. The right to protect our homes is as sacred as the right to defend our lives. The citizens of the South Park district, to a man, protest and will not permit this injustice."

Petitions Are Planned

The Rev. David Coughlin, pastor of St. Ambrose Parish, which includes the Okell Street site, said petitions would be circulated in the neighborhood to have the selection rescinded.

Father Coughlin said he wanted "to protest vehemently against this project in the name of the people living in this district. Of course the Negro workers should be taken care of but this is not the place. There are none living or working here now. Execution of such a project would tremendously reduce the value of homes in this neighborhood, homes which represent the life savings of many of our parishioners."

The 11 civic and labor leaders sent a telegram to the two legislators asking an investigation of the project and that "you do all in your power to stop these plans immediately; all South Buffalo is united in opposition to this project." The signators are:

Leaders Sign Protest

Andrew O. Jacobsen, chairman of the board of directors, Tri-Abbott South Park Businessmen's Association; Leon Strauss, president, South Buffalo Businessmen's Association; Hugh R. Shreeman, president, Pioneer Civic Association; Mrs. Edward C. Bogner, president, South District Better Political Club; Mrs. Thomas C. Cuffe, president, Women's South Park Community Club.

Mrs. Patrick J. Ridge, acting president, South Buffalo Women's Democratic Club; Mrs. Bertram Smith, president, Women's Civic Club of South Buffalo; John J. Fitzsell, president, South Side Club; August Wolfe, president, Tug Firemen; Coleman Perkins, president, Grain Shovelers, and Thomas F. Higgins, vice president, Freight Handlers' Union.

Mass Meeting Planned

Supervisor William A. Boyer of the Second Ward also requested Senator Mead and Representative Butler to have the site selection rescinded, contending that if the project is intended to care for Negro workers in the Bethlehem Steel Company plant in Lackawanna it should be located in Lackawanna.

Supervisor Andrew ... Morrisey, 153 Kentucky st., of the First Ward also joined in the protest against the site, with the following letter to the Buffalo Evening News:

"I wish to protest against the Negro defense-housing site for South Buffalo. I have received protests from all the people of South Buffalo. Many new homes which are now being built will become depreciated. Why not clear the slum areas? South Buffalo is growing rapidly, and this would very much hinder its progress."

Egan Clarifies Stand

Under auspices of the Mungovan Men's Club, a protest meeting will be held tonight at 8 o'clock at 216 Colgate ave. Tomorrow evening a mass meeting will be held in Brown's Hall, 2023 South Park ave.

G. Nelson Tatu, Republican candidate for councilman in the South District, who arranged it, emphasizes that the gathering will be non-partisan, with everyone invited to join in the protest.

Okell Street runs west from McKinley Parkway, crosses South Park Avenue and ends at Hopkins Street. The site selected by federal officials for the Negro project is near Hopkins.

The position of the Buffalo Municipal Housing Authority in the selection was set forth by Chairman John J. Egan in the following statement recounting his reply to a man who inquired by telephone if Mr. Egan had any hand in the selection of the Okell Street site:

Pastors Protest

"My reply to the irate gentleman was that I had—that we showed the Okell site among many others to federal officials for possible defense housing.

Insofar as a specific Negro project was concerned we concurred in the recommendation previously made by Robert Taylor, FWA consultant on racial conditions."

This recommendation was for a site in Clinton Street in Cheektowaga and was adopted by FWA and USHA officials but subsequently set aside because of protest from Cheektowaga officials and other residents.

Jamestown Bank Accepts Jackson's Resignation

Special to the Buffalo Evening News.

JAMESTOWN, Aug. 14. — The resignation of Associate Justice Robert H. Jackson of the U. S. Supreme Court as a director of the Bank of Jamestown has been accepted with regret by the Board of Directors, George C. Nieback, president, announced today. Justice Jackson became a member of the board in 1919 while practicing law here.

...day evening in Calasanz ... Hall.

Her second appearance in ... Court in two days on intox... charges resulted in a ten-day ... tentiary sentence today for ... Allen, 32, of 103 North ... st. ... pleaded guilty.

A drunken-driving charge ... Walter Krawczak, 2... of 123 ...mpse st., was dismissed in ... Court today for insufficie... dence. He pleaded guilty to ... ond charge, driving withou... cense, and paid a $10 fine.

Possession of a policy sl... Fred Hill, 41, of 635 East E... a $5 penalty when he pleaded ... in City Court today.

Sixty-one Cygni, the first ... have its distance from the ... measured, will be visible to... evening from 9 to 10 throu... Museum of Science telescop... star is 27-trillion miles fro... earth.

Body of Buffalonian Taken From Bear Lake

Special to the Buffalo Evening News.

DUNKIRK, Aug. 14.—Th... of Anthony H. Millewski, 3... St. Joseph st., Buffalo, wh... drowned in Bear Lake, ab... miles south of here, Sunda... ing, was recovered shortly ... o'clock Wednesday aftern... State Trooper W. J. Szama... Westfield and Walter Lar... resident of Bear Lake. Th... was found in 30 feet of w... short distance from the bea...

Mr. Millewski and his ... came to Bear Lake Saturd... ning to spend the week-en... went fishing in a rowboa... o'clock Sunday morning an... lieved to have lost his ... while casting.

Coroner George E. Blood... Cosla issued a certificate o... by accidental drowning. Th... was taken to Buffalo for ... Mr. Millewski, who was a ... ter, is survived by his wif... Stella Millewski, and a s... thony Jr., 10.

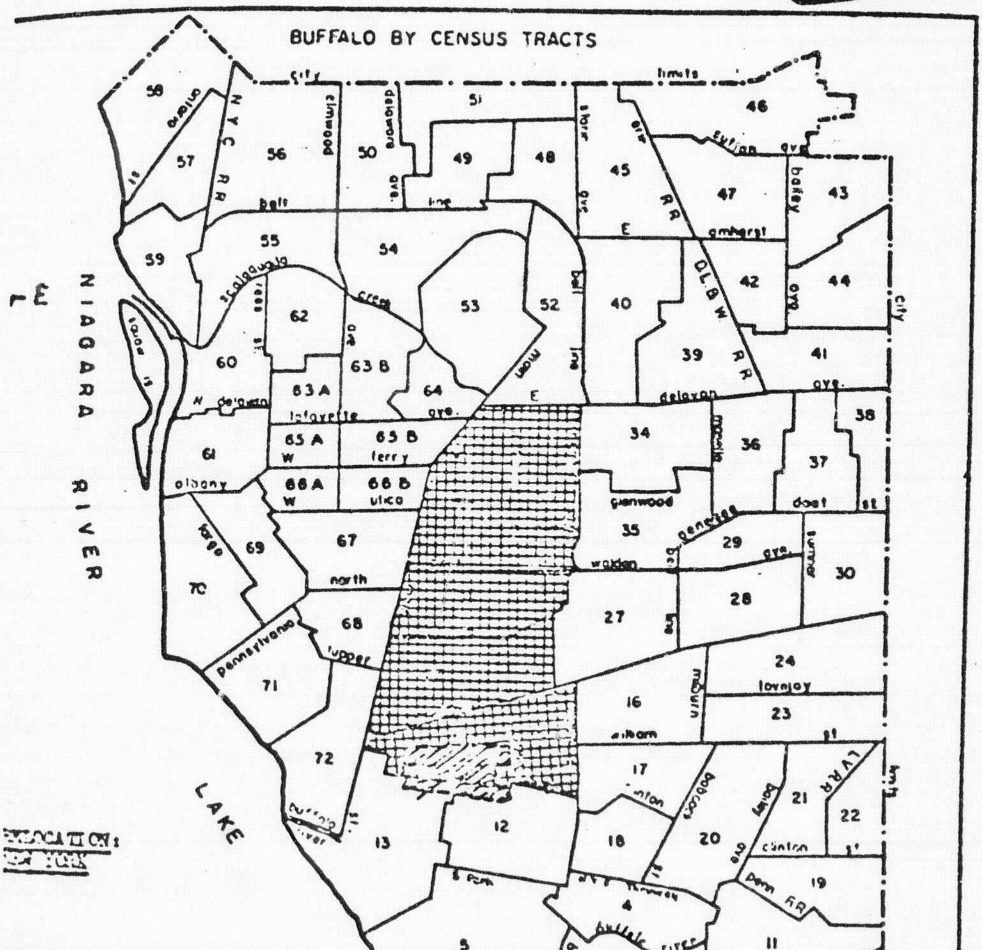
Robbery Victim Held As Material Witness

A robbery victim was co... to jail as a material witnes... after two men who alleg... costed him in a parking l... took $23 pleaded innocent ... Court. Charged with first ... robbery, the suspects, John ... 30, of 211 14th st. and Fra... Santa, 27, of 290 Swan st ... arraigned before Judge Ha... Zimmer, who set Monday ... hearing and fixed bail for E... at $1000. Santa has been ... on bail.

The men were arrested ... foot chase during which De... Austin J. Curry and De... Keane fired four warning ... The detectives said they di... the men in the act of robbi... Karmacynski, 40, of 86 Eas... st. in a parking lot at 73 Eas... early Wednesday morning.

At the suggestion of A... District Attorney Alfred E... Judge Zimmer or... ... ski held in default

Plaintiffs' Exhibit 230.



POINT V

There is subject matter jurisdiction by reason of the presence of individual defendants including Superintendent Manch, Common Council members, Mayor, and Commissioner of Education regardless of whether the Buffalo Board of Education or the Board of Regents is held to be a person.

The State appellants' brief (pp. 40-47) and that of the City defendants (pp. 18 and 19) argue lack of subject matter jurisdiction under Section 42 U.S.C. Section 1983 contending the "acts of segregation" are those of units of State and local government and not the individual defendants.

In addition, this record demonstrates that many of the individual defendants—especially appellants Superintendent Manch, Common Council members and Commissioner of Education Nyquist—were personally involved with most of the segregative acts. Not that this is a requirement, for there is the responsibility of present officials to respond and redress the acts of their predecessors which have a current impact upon segregated schools. See, *e.g., Keyes v. School District No. 1, Denver, Colorado,* 413 U.S. 189 (1973);

The argument of lack of subject matter jurisdiction is not supported by the authorities discussed in the State and City briefs. However, it should be noted that the Supreme Court is yet to decide whether a school board or district is a person. In *Mt. Healthy City School District Board of Education v. Doyle,* .... U.S. ...., 97 S.Ct. 568 (1977) the Court stated, "The related question of whether a school district is a person for purposes of Section 1983 is likewise not before us. We leave those questions for another day . . ." 97 S.Ct. at 572. Although this Court has stated a contrary conclusion with respect to a school board only, *Monell v. Dept. of Soc. Serv. of*

the City of New York, 532 F.2d 259 (2d Cir. 1976), it is the position of plaintiffs-appellees that the Buffalo Board of Education and the Board of Regents* are *persons* within the meaning of Section 42 U.S.C. Sec. 1983. But, this Court need not decide this issue because of the presence of individual defendants.

In *Gresham v. Chambers*, 501 F.2d 687 (2d Cir. 1974), this Court considered an action by a black faculty member of Nassau Community College for an injunction restraining appointment of a white person as associate dean. Dr. George Chambers, President of the Community College, and A. Holly Patterson, Chairman of the Board of Trustees, were named as defendants. In rejecting the claim that subject matter jurisdiction was lacking because the action was in reality against the county the Court held:

> [1] At the outset we face the threshold question of whether the district court had jurisdiction over this action. Appellees argue that the suit, insofar as it is based on 42 U.S.C. § 1983, should have been dismissed for lack of jurisdiction for the reason that it is in reality an action against the county, a municipal corporation, which is not a "person" within the meaning of the Civil Rights Acts, see City of Kenosha v. Bruno, 412 U.S. 507, 93 S.Ct. 2222, 37 L.Ed.2d 109 (1973); Monroe v. Pape, 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492 (1961), and that the appointment of members of the president's staff is a representative, not an individual, function of the Board of Trustees and of the President, its appointee. See N.Y. Education Law §§ 6301, 6304(1)(b), and 6306. The College, they further point out, has been created by the County of Nassau pursuant to the Education Law, with a

* The statutory description of the Regents—Board of Regents—as the *head* of the Department of Education (*N.Y. Education Law Secs.* 101 and 303) should be sufficient to find it to be a person.

> nine-member board, five appointed by the Nassau County Board of Supervisors and four by the Governor of New York. This contention must be rejected, however, since the complaint names Dr. Chambers and Mr. Patterson individually, which for jurisdictional purposes is sufficient to preclude the action from being classified solely as one against the county. Cf. Bell. v. Hood, 327 U.S. 678, 66 S.Ct. 773, 90 L.Ed. 939 (1943) [501 F.2d at 690].

And in the course of the decision in *Monell v. Dept. of Soc. Serv. of the City of N.Y.*, 532 F.2d 259, *supra*, this Court stated, "There is no doubt that municipal and state officials, sued in their official capacities, are 'persons' within the meaning of Section 1983 when they are sued for injunctive or declaratory relief" 532 F.2d at 264.

At all times in this action the Court has had *in personam* jurisdiction over the defendant City Superintendent, the Mayor and City Council, the State Commissioner of Education, as well as *in personam* jurisdiction over the Buffalo Board of Education and State Board of Regents. Each have appeared, answered, been represented by counsel throughout and participated in all stages of the proceedings.

The State and City appellants rely upon *Brault v. Town of Milton*, 527 F.2d 730 (3d Cir. 1975), and *Rizzo v. Goode*, 423 U.S. 362 (1976). These cases do not support the appellants' position but are authority by implication sustaining subject matter jurisdiction in school desegregation cases. The decision *en banc* in *Brault*, where the only defendant was the Town of Milton, Vermont, in an action unrelated to school segregation, is only authority for a holding that the plaintiffs' complaint failed to state a cause of action. 527 F.2d at 736.

Rizzo v. Goode, 423 U.S. 362 (1976) also is not in point. There the Court refused jurisdiction over isolated instances of police misconduct which did not constitute any plan or

policy by the defendant Mayor Rizzo. Although federal courts have been reluctant to order remedies involving municipal police departments, there has been no such reluctance in school desegregation cases where equitable remedies have been necessary to correct dual school systems orchestrated by segregative acts of school officials. The Court in *Rizzo,* recognized the importance of ending segregated schools:

> Respondents claim that the theory of liability embodied in the District Court's opinion is supported by desegregation cases such as *Swann v. Charlotte-Mecklenburg Board of Education,* 402 U.S. 1 (1971). But this case, and the long line of precedents cited therein, simply reaffirmed the body of law originally enunciated in *Brown v. Board of Education,* 347 U.S. 483 (1954):
>
> > 'Nearly seventeen years ago this Court held, in explicit terms, that state-imposed segregation by race in public schools denies equal protection of the laws. At no time has the Court deviated in the slightest degree from that holding or its constitutional underpinnings.
> >
> > . . . .
> >
> > 'Once a right and a violation have been shown, the scope of a District Court's equitable power to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies.' *Swann,* 402 U.S. at 11, 15.

The Trial Court properly held that the segregative acts of the defendants in this case were quite different than the situation in *Rizzo* (A-1023). The record here established present and past segregative acts on the part of appellants Manch, Common Council, Board of Education, State Commissioner and Board of Regents. Also, the existence of segregative acts of earlier date is highly relevant.

> We made it clear, however, that a connection between past segregative acts and present segregation may be present even when not apparent and that close examination is required before concluding that the connection does not exist. *Keyes v. School District No. 1, Denver Colorado,* 413 U.S. 189 (1973), at 212.

The plaintiffs in a school desegregation case are entitled to the elimination of past acts of segregation because they have a current effect upon the system. In *Hart v. Community School Bd. of Brooklyn, N.Y. Sch. Dist. No. 21,* 512 F.2d 37 (2d Cir. 1975) it was noted that the conduct of a predecessor school board plays a significant part in liability. 512 F.2d at 51. In *Hart* neither this Court's opinion nor that of the District Court, 383 F.Supp. 699 (E.D.N.Y. 1974), focused upon subject matter jurisdiction, but such jurisdiction is implicit. The Community School Board was a defendant along with individual officials as in the present case. The principal responsibility was with the *Board* over which the Court had *in personam* jurisdiction.

Recently this Court handed down decisions in two cases where boards of education were defendants along with individual members and the issues related to a school board policy or plan. In *East Hartford Education Association et al. v. Board of Education of the Town of East Hartford, et al.,* .... F.2d .... (2d Cir., August 19, 1977, Docket No. 76-7005), the Court, *en banc*, in an action for declaratory and injunctive relief under 42 U.S.C. Sec. 1983, refrained from interferring with a school board policy which caused a teacher to be reprimanded for not wearing a tie. In *U.S. et al. v. Board of Education of Waterbury, Conn. et al.,* .... F.2d .... (2d Cir. August 31, 1977, Docket No. 77-6111) the Court held that there was no abuse of discretion by the District Court in ordering a particular desegregation plan.

The following words of the Trial Court present a concise answer to the claim of lack of subject matter jurisdiction:

> The Second Circuit in *Monell, supra,* has stated that '[t]here is no doubt that municipal and state officials, sued in their official capacities, are 'persons' within the meaning of § 1983 when sued for injunctive or declaratory relief.' (Slip Op. at 2420). There is a recognition here of the fiction inherent in the case of *Ex Parte Young,* 209 U.S. 123 (1908), in which the Supreme Court ruled that although a state cannot be sued under the eleventh amendment, a suit can be maintained against a state official. The requirement of suing 'persons' instead of municipalities or agencies under § 1983 is a further extension of this same fiction. Although a school board itself cannot be sued, individual members can be. And, once the individuals are named, the suit proceeds as it if were against the school board as a separate entity. Indicative of this fiction is the statement of the Supreme Court in *Keyes v. School District No. 1,* 413 U.S. 189, 210-211 (1973):
>
> > The courts below attributed such significance to the fact that many of the Board's actions in the core city area antedated our decision in *Brown.* We reject any suggestion that remoteness in time has any relevance to the issue of intent. If the actions of school authorities were to any degree motivated by segregative intent and the segregation resulting from those actions continues to exist, the fact of remoteness in time certainly does not make those actions any less 'intentional.'
>
> In other words, it is the actions of the school board, and not just the present board members, that are considered by the courts. If the law were otherwise, a school board or other entity could escape responsibility by a change of members whenever suits arose [A-1024-1026].

The City and State appellants' reliance upon *Mayor of the City of Philadelphia v. Educational Equality League,* 415 U.S.

605 (1974), and *Spomer v. Littleton*, 414 U.S. 514 (1974) (pp. 44 *et seq.* of State and 1 *et seq.* of City) is also misplaced. Judge Curtin distinguished these cases pointing out that in the instance of school desegregation School Board policies and practices—both City and State—that are involved, whereas "In *Mayor v. Spomer*, ... the Court was dealing with specific acts personal to specific individuals no longer in office" (A-1294). As Judge Curtin correctly held, the Boards act as a body and "if only the actions of individual board members could be considered, and individuals held liable for them, corporate entities such as a school board could continually escape liability by changing their membership." (A-1290).

POINT VI

The District Court properly exercised its discretion in adding as parties defendant, in their official capacities, the new School Superintendent and the then current members of the Buffalo Board of Education and State Board of Regents.

In anticipation of the Court's handing down its Decision and Order, plaintiffs-appellees, on March 29, 1976, moved the Court to add as parties defendant the new Superintendent of the Buffalo Public Schools and the current members of the Buffalo Board of Education and the State Board of Regents. Plaintiffs-appellees' motion set forth the basis of the application as follows:

> In support of the motion the plaintiffs respectfully show to the Court that this Court has personal jurisdiction over each and every person named in the amended title of this action by reason of the appearances and participation herein. This Court also has full subject matter jurisdiction upon plaintiffs' requests for declaratory and

injunctive relief by reason of the defendants originally named herein including defendants Ewald P. Nyquist and Joseph Manch. . . .

However, to eliminate any possible issue of subject matter jurisdiction which may be raised by reason of *City of Kenosha v. Bruno,* 412 U.S. 507 (1973), and to afford full, adequate and effective declaratory and injunctive relief, the plaintiffs request the Court to follow the reasoning set forth in the decision of *Ingram v. Wright,* 498 F.2d 248 (5th Cir. 1974 at page 252), wherein the Court upon remand stated in part:

> The district court should on remand grant the likely request of plaintiffs to add the individual members of the Dade County School Board as parties defendant under Count Three of the complaint. Without regard to whether the plaintiffs may ultimately be entitled to any equitable relief against the school Board of its members, fairness and efficient judicial administration justify the addition of the individual school board members insofar as the plaintiffs seek declaratory and equitable relief restraining the School Board from authorizing or implementing corporal punishment in Dade County . . . [Citations omitted].

WHEREFORE, plaintiffs respectfully pray that this Court grant the amendments herein to the complaint and summons in accordance with this motion and that the pleadings be deemed amended accordingly (A-1007, 1008).

The motion was heard by Judge Curtin on either April 13 or 14, 1976, but unfortunately there are no minutes available (see Docket entries for April 1976, A-7).

The City defendants filed no opposition to the application to add the current Superintendent Eugene T. Reville and individual Board members, although the City's formal "in opposition" is noted in the Court's Order granting the motion

(A-1914). In its Decision granting the motion the Court stated: "Attorneys for the State and City defendants have indicated that no new offers of evidence will be forthcoming if this motion is granted" (A. 1029).

The Court, in the Order granting the motion, found "that no prejudice has been demonstrated to the defendants by granting the relief requested" (A. 1014).

The appellants, especially the eight separate Regents, seek to make much of the Court's granting this motion. Appellees respectfully suggest that this is an effort to inject a "red herring" issue. The Board of Regents and the Board of Education have been defendants throughout. They are the members in their official capacities. The real parties in interest were represented throughout. Appellant Regent Genrich, who filed an affidavit upon a motion for reconsideration weeks after the Court's Decision of April 30, 1976 (A-1284) claiming he would have testified had he known his name was to be added to the title, displays oversensitivity which tends towards inconsistency. He was present at the trial (A-927) and did not testify. Was he any less a member of the Board of Regents during the trial than when his name was added? The fact of the Regents full representation by counsel is illustrated during the examination of Regent Dr. Kenneth B. Clark, called as a witness by appellees. As the Assistant Attorney General began his questioning of Dr. Clark he stated, "I am your lawyer, Doctor. . . ." (A-927).

The newly added defendant Eugene Reville was the then Associate Superintendent at the time of trial at which he testified (A-962). Subsequently, and before the Court's Decision and Order of April 30, 1976, he succeeded defendant Superintendent Joseph Manch, although the event and date is not set out in the record. The appellant Reville would

automatically have been substituted for the appellant Manch under Rule 25(d) of the *Federal Rules of Civil Procedure,* which provides that the successor of a public officer is automatically substituted as a party to an action in his official capacity where the original defendant ceases to hold office during the pendency of an action.

As regards the new members of the Board of Education and Board of Regents, District Courts are given broad discretion to grant amendments and to add or drop parties at any stage of the proceedings upon such terms as are just. Rules 14(c), 19 and 21 of the *Federal Rules of Civil Procedure.* The Court gave all concerned an opportunity to request the right to offer additional evidence but "attorneys for the State and City defendants have indicated that no new offer of evidence will be forthcoming if this motion is granted" (A-1029).

Page 60 of the separate appellants' brief quotes limited language from *Ingraham v. Wright,* 498 F.2d 248 at 252, namely, upon remand "the defendants must, of course, be offered an opportunity to offer evidence." This direction in *Ingraham* was not restricted to Board members to be added and must be read in the context of the court having, in effect, granted a directed verdict. The full direction is: "Since the plaintiffs' evidence makes a prima facie case . . ., the dismissal of Count Three of the complaint must be reversed and remanded to the district court for further proceedings. While the defendants must, of course, be afforded an opportunity to offer evidence, the district court may find no reason to require the plaintiffs to offer their evidence a second time. It may proceed with the case as though defendants' motion for dismissal had been denied. See, *Federal Deposit Insurance Corp. v. Mason,* 115 F.2d 548, 3 Cir. 1940; *Gulbenkian v. Gulbenkian,* 147 F.2d 173, 2 Cir. 1945; 5 Moore ¶ 41.13(2)." 498 F.2d at 252.

To the extent that this latter ruling has any pertinency to the present case, Judge Curtin inquired whether there was any desire to offer additional evidence but the Buffalo Board and Board of Regents made no such request (A. 1029).

The Chancellor of the Board of Regents, Joseph W. McGovern, testified upon the trial (A. 973) as did Regent Kenneth B. Clark (A. 892). The Trial Court found that the Regents "were ably represented from the beginning of this lawsuit" and "the individual Regents had full notice of the action" (A. 1290). The matters referred to in Regent Genrich's affidavit—arranging meetings and making statements—were before the court through the testimony of the witness Gardner (A-285), various exhibits (*e.g.*, A-1707) and the State's answer to interrogatories.

The affidavit of the Attorney General's Assistant Solicitor General, Jean M. Coon, Esq. (A. 1009), in opposition to motion to name the individual Regents, makes reference to no evidence to be offered or prejudice. The affidavit mainly argues *Rizzo v. Goode* contentions which have been answered earlier in this brief. As is normal with change of Boards, Mrs. Coon points out that "some of these persons did not hold their present offices either at the time the action was commenced or at the time of trial."

The separate appellants' brief at page 159 seeks to distinguish *Mullaney v. Anderson*, 342 U.S. 415 (1952) (parties added upon appeal), upon the ground that plaintiffs and not defendants were involved. However, the reasoning of the Supreme Court is applicable here: "To grant the motion merely puts the principal, the real party in interest, in the position of his avowed agent. The addition of these two parties can in no wise embarrass the defendant. Nor would their earlier joinder have in any way affected the course of the litigation." 415 U.S. at 417.

The remaining cases cited by the separate brief are plainly distinguishable. The opinions emphasize the District Court's broad discretion under Rules 15, 19 and 21. See *e.g., Fair Housing Development Fund Corp. v. Burke,* 55 F.R.D. 414 (E.D. N.Y. 1972) (footnote 7) (cited on p. 51 of separate brief). Most of the other cases do not involve factual situations where the persons sought to be added are officials of an existing defendant Board which has participated and been fully represented throughout the action.

Lastly, in *Oppenheimer Mendez v. Acevedo,* 512 F.2d 1373 (First Cir. 1975) (cited on p. 63 of separate brief), the Court granted a motion to amend by permitting defendants to be sued in their capacity as public officials. Appellants were given ten days to come forward with any new evidence that was pertinent. No such evidence was offered and the Court stated that appellants had no grounds for a claim of prejudice, the District Court's ruling being clearly proper under Rule 15(b) 512 F.2d at 1374 (footnote 1). In the present case the members of the Board of Regents, through their attorney, were asked by Judge Curtin if they wanted to present any additional evidence but no such request was made (A-1029).

As regards the contention that it was necessary to personally serve the new superintendent, Mr. Reville, and each of the members of the Board of Education and Regents, this was not required by Judge Curtin's Order (A-1015) which provides that the summons, complaint, answer and all pleadings are deemed so amended (A-1018). Rule 15(c) provides that amendments relate back; the Court made an express finding of notice (A-1290) and the absence of any prejudice (A-1014).

POINT VII

The Court has broad equitable power in fashioning its decree to remedy local and state imposed segregation. A direction to the State defendants to "come forward with a detailed scheme of involving the suburban schools in the participation with the plan" is addressed to the Commissioner of Education and the Regents who have responsibility to devise a desegregation plan.

Following the Decision and Order of April 30, 1976 upon the issue of liability, the first remedy hearings were held in June 1976. On July 9, 1976, the Court rendered its oral decision from the bench covering many aspects of the Buffalo school system. The defendants filed notices of appeal from the July 9, 1976 order. However, no appellant raises any issue with respect to remedy, nor is any part of the remedy hearings included in the Record or Joint Appendix, except that the brief of the separate appellants' claims in POINT VII that the Court was not authorized to direct the State defendants to "come forth with a detailed scheme of involving the suburban schools" (A-1286 b) in light of *Milliken v. Bradley*, 418 U.S. 717 (1974) (*Milliken I*).

It is appellee's position that Judge Curtin had authority to make this direction as against the Commissioner of Education and Regents. The Order is not addressed to suburban school districts but only to the State. No suburban school district has come forward objecting to Judge Curtin's order.

Milliken I merely held that on the record relative to the Detroit school system there was no basis to order a metropolitan-wide remedy. But subsequent decisions in the Supreme Court have clarified *Milliken I*. In *Hills v. Gautreaux*,

425 U.S. 284 (1976), it was held that a remedial order beyond Chicago's geographic boundary, but within a relevant housing market was warranted. "Nothing in the *Milliken* decision suggests a *per se* rule that federal courts lack authority to order parties found to have violated the Constitution to undertake remedial efforts beyond the municipal boundaries of the city where the violation occured" 96 S. Ct. at 1546.

In *Milliken II* the Supreme Court held that it was proper to order the State of Michigan to pay for remedial education programs of Detroit's remedy. .... U.S. .... (June 17, 1977). In its *Milliken II* decision, the Court again emphasized the broad equitable powers which the District Courts must use as outlined in *Brown v. Board of Education of Topeka,* 349 U.S. 294, 300 (1955) (Brown II), *Swann v. Charlotte-Mecklenburg Board of Education,* 402 U.S. 1 (1971), and *Keyes v. School District No. 1, Denver, Colorado,* 413 U.S. 189 (1973).

It is known that it is difficult to have a complete desegregation plan where the remedy is confined to a city school district. The court had the authority to direct the State to come forth with "a detailed scheme of involving the suburban schools in the participation with the plan." The record does not show whether or not there was compliance with Judge Curtin's direction. It may be that there are ways and means of involving suburban districts in a plan under New York law and educational practices and policies which would not be contrary to *Milliken I.* Until a specific plan is before the Court, no judgment can be made upon its merits or authority to order its implementation.

Accordingly, it is the position of appellees upon this narrow point, raised by only the brief of the separate Regents, that Judge Curtin had the power to order the State to try to devise a *modus operandi* for suburban participation. Other

than this direction, there is nothing before the Court, and appellees urge that any decision be withheld upon this subject until a particular proposal is forthcoming.

Conclusion.

The record contains substantial evidence of intentional acts of segregation in the BPSS for which all appellants are responsible. The District Court was compelled to find that the appellants have violated the plaintiffs' Fourteenth Amendment right to equal protection under the laws by intentionally causing and maintaining a segregated school system. There is no error in the other Decisions and Orders appealed from. The Decisions and Orders of the District Court should be affirmed.

Respectfully submitted,

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Buffalo, New York

September 7, 1977

REPLY BRIEF ON BEHALF OF APPELLANTS NYQUIST, BOARD OF REGENTS, BLACK, PFORZHEIMER, ALLAN, CLARK, NEWCOMB, BATISTA AND CHODOS

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

NO. 76-7292

Nos. 76-7292 76-7450
76-7391 76-7466
76-7506 76-7485
76-7449 76-8240

GEORGE ARTHUR, NORMAN GOLDFARB, WILLIAM and WILHELMINA P. SEALES, JOHN MEDIGE, and the CITIZENS COUNCIL FOR HUMAN RELATIONS, INC. and NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, BUFFALO BRANCH,

Appellees,

-against-

EWALD B. NYQUIST, Individually and as Commissioner of Education of the State of New York, THE BOARD OF REGENTS OF THE STATE OF NEW YORK, THEODORE M. BLACK, CARL H. PFORZHEIMER, JR., ALEXANDER J. ALLAN, JR., JOSEPH C. INDELICATO, M.D., KENNETH B. CLARK, HAROLD E. NEWCOMB, WILLARD A. GENRICH, EMLYN I. GRIFFITH, GENEVIEVE S. KLEIN, WILLIAM JOVANOVICH, MARY ALICE KENDALL, JORGE L. BATISTA, LOUIS E. YAVNER, MARTIN C. BARELL and LAURA BRADLEY CHODOS (Individually and as Members of the Board of Regents of the State of New York), JOSEPH MANCH, Individually and as Superintendent of Schools of the City of Buffalo, EUGENE T. REVILLE, Individually and as Superintendent of Schools of the City of Buffalo, THE BOARD OF EDUCATION OF THE CITY OF BUFFALO, FLORENCE E. BAUGH, SAMUEL E. SACCO, JOSEPH E. MURPHY, MOZELLA RICHARDSON, DR. MATT A. GAJEWSKI, LOUIS C. BENTON, MICHAEL J. RYAN, JOSEPH D. HILLERY and MARILYN P. KAVANAUGH (Individually and as Members of the Board of Education of the City of Buffalo), STANELY M. MAKOWSKI, Mayor of the City of Buffalo, and DELMAR L. MITCHELL, RAYMOND LEWANDOWSKI, GUS FRANCZYK, ALFREDA W. SLOMINSKI, WILLIAM J. DAURIA, JOSEPH S. FORMA, MICHAEL McCARTHY, WILLIAM B. HOYT, GEORGE K. ARTHUR, RICHARD F. OKONIEWSKI, HORACE C. JOHNSON, JOHN A. RAMUNNO, ANTHONY M. MASIELLO, DANIEL J. HIGGINS and WILLIAM A. PRICE, constituting the members of the Common Council of the City of Buffalo,

Appellants.

Appeal from the United States District Court for the Western District of New York.

AFFIDAVIT OF SERVICE BY MAIL

State of New York)
County of Genesee) ss. :
City of Batavia)

Re: George Arthur et al vs.
Ewald P. Nyquist et al
NO. 76-7292

I, Leslie R. Johnson being duly sworn, say: I am over eighteen years of age and an employee of the Batavia Times-Publishing Company, Batavia, New York.

On the 7th day of October, 19 77 I mailed copies of a printed Briefs in the above case, in a sealed, postpaid wrapper to:

10 Copies to A. Daniel Fusaro, Clerk,
U. S. Court of Appeals
2nd Circuit-New Federal
Court House, Foley Square
New York, N.Y. 10007

2 Copies to Leslie G. Foschio Esq.,
Corporation Counsel
City of Buffalo,1100
City Hall,
Buffalo, NY 14202

2 Copies to Hon. Louis J. Lefkowitz
Attorney General State of NY
The Capitol
Albany, NY 12224 Att: Jean
M. Coon, Asst. Atty.Gen'l.

2 Copies to Linden & Deutsch Esqs.
110 East 59th Street
New York, N.Y. 10022
Att: David Blasband Esq.

2 Copies to Peter Bienstock, Esq.
Puerto Rican Legal Dept &
Educational Fund Inc.
95 Madison Avenue
New York, N.Y. 10016

at the First Class Post Office in Batavia, New York. The package was mailed Special Delivery at about 4:00 P.M. on said date at the request of:

Moot, Sprague, Marcy, Landy, Fernbach & Smythe, 2300 Erie County Savings Bank Bldg., Buffalo, NY 14202 Att: Richard F. Griffin Esq.

Leslie R. Johnson

Sworn to before me this

7th day of October, 19 77

Patricia A. Lacey
PATRICIA A. LACEY
NOTARY PUBLIC, State of N.Y., Genesee County
My Commission Expires March 30, 1979